TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 343.

FRANK BLACKLOCK, EXECUTOR OF RINALDO P. SMITH, REPRESENTING THE FIRM OF SMITH, ELLETT & CO., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 19, 1906.

(20,308.)

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1 I.

In the Court of Claims.

22911.

FRANK BLACKLOCK, Executor of Rinaldo P. Smith, Deceased, Representing the Former Firm of Smith, Ellet- & Co.,

vs.

THE UNITED STATES.

Amended Petition.

To the Honorable Judges of the Court of Claims:

The petition of Frank Blacklock, executor of Rinaldo P. Smith, of Baltimore, Maryland, respectfully shows:

1. That this petitioner is a citizen of the United States and of the State of Maryland and a resident of the city of Baltimore in said State, and brings this suit as executor of the last will and testament of Rinaldo P. Smith, the sole representative and legal successor of the former firms of Smith, Ellett & Company and Larrabee, Smith & Ellett, of Baltimore, Maryland.

2. That the said Smith is the same Rina-do P. Smith referred to in the Act of Congress, approved May 27, 1902, entitled "An Act for the allowance of certain claims for stores and supplies reported by the Court of Claims under the provisions of the Act approved March third, eighteen hundred and eighty-three, and commonly known as the Bowman Act, and for other pur-
2 poses," being No. 124 of the Public Acts of the Fifty-seventh Congress, which provides, on page 42, as follows:

"That jurisdiction is hereby conferred on the Court of Claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the Government of the United States on the account of the sale, purchase, or occupation by the Government, through its internal revenue officers or others, of certain real estate of one George J. Stephens, in Greene county, Virginia, upon which the late firm of Smith, Ellett & Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the Government to plead the statute of limitations in bar of said claim is hereby waived, Provided, that said claimant file his petition within sixty days from the passage of this Act in said Court of Claims, either at law or in equity as he may deem the rights of his case shall require; and the Government shall, upon notice served according to the rules and practice of said Court, appear and defend against said suit, and the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law."

3. That in the year 1869 and thereafter the said Rinaldo P. Smith and one Francis M. Ellett were doing business in the said city of Baltimore as leather merchants under the firm name of Smith, Ellett & Company and a certain George J. Stephens, of Greene county, in the State of Virginia, being then indebted to said firm in the sum of seven thousand dollars ($7,000) lawful money of the United States, and being desirous to obtain credit from said firm for a further indebtedness of two thousand dollars ($2,000), in order to secure said firm for the money already due and to become due as aforesaid, did, on the 28th day of October A. D. 1869, by his certain deed of trust of that date con-
3 vey to a certain Wyatt S. Beazley, trustee, of said county and State, all the real estate of said Stephens in said county, consisting of several tracts of land containing about 400 or 500 acres or upwards situated in the county of Greene and State of Virginia, lying on the Rockingham turnpike about four miles from Stanardsville, being the same land upon which the said Stephens then resided, together with the mansion house and other buildings thereon, including the tannery and distillery thereon, and all things appurtenant thereto, in trust to secure the payment to the said Smith, Ellett & Company of the amount already due and to become due through subsequent acceptances and payments as aforesaid and as set forth in said deed; and said deed of trust was duly recorded on the 30th day of October, A. D. 1869, among the land records of said Greene County in Book No. 3, page 266, and became thenceforth a valid and subsisting first lien upon said land and premises.

4. That subsequently, to wit, on or about the 25th day of January A. D., 1870, the said Rinaldo P. Smith and Francis M. Ellett, constituting said firm, did execute, at the request of the said Stephens and of the United States internal revenue officers, a waiver of the priority of their lien upon the distillery building and three acres of land immediately adjacent thereto, in the following words, to wit:

"BALTIMORE, *January* 25, 1870.

"We hereby give our consent to the use of the distillery premises of Geo. J. Stephens, situated on the Harrisonburg turnpike, about four miles from Stanardsville, and which premises contain about three acres of land, more or less, immediately surrounding the distillery building, and which building is contained thereon, or comprised therein, by said George J. Stephens, subject to the pro-
visions of the Internal Revenue Law, and that the lien
4 of the United States for taxes and penalties hereafter incurred shall have priority to the extent of the above-mentioned premises, of a certain deed of trust, executed by said George J. Stephens for our benefit, and whereof Wyatt S. Beazley is trustee, and that in case of the forfeiture of the said distillery premises, or any part thereof, the title of the same shall rest in the United States, discharged from said deed of trust.

"Given under our hands and seals this twenty-fifth day of January, A. D. 1870.

"R. P. SMITH, [SEAL.]
"FRANK M. ELLETT, [SEAL.]
"*Of Smith, Ellett & Co.*

"Witness-:
"W. M. WOODS.
"J. Q. H. SMITH."

But the prior lien of the said firm upon the remainder of the Stephens land was in no wise disturbed or waived, and remained as it was, a subsisting first lien and mortgage upon said land and premises, excepting only the three acres constituting the distillery premises, upon which it still remained a lien subject only to the priority of the United States in the manner set forth.

5. That subsequent to the making and recording of said deed of trust, as aforesaid, by the said George J. Stephens and prior to November 1, 1870, the said firm of Smith, Ellett & Company continued the course of dealing with the said Stephens provided for in said deed of trust, accepting drafts from said Stephens and paying out money upon such acceptances, and on the last-mentioned date the sum of eight thousand six hundred and sixty-six dollars ($8,666.44) and forty-four cents in cash was due from said Stephens and secured by said deed of trust, which was a lien upon the land of Stephens for that amount.

6. That in the month of December, 1870, the Government of the United States, through a certain A. M. Lawson, its deputy collector of internal revenue for the Sixth District of Virginia, levied upon the distillery premises of said Stephens to satisfy certain internal revenue taxes to the amount of $4,200, or thereabout, claimed to be due and in arrears from the said Stephens, and in the same month, pending said levy and before sale, all the buildings and fixtures upon said distillery premises were destroyed by fire.

7. That after the destruction of the distillery premises by fire, as aforesaid, the said A. M. Lawson, deputy collector as aforesaid, claiming to act by the authority and instruction of the Government of the United States, made a new levy upon all the land of said Stephens, including as well the large tract, or tracts, upon which the said firm of Smith, Ellett & Company had a prior lien, as aforesaid, as the distillery premises upon which they waived their lien, and advertised the same to be sold at public auction on the premises, on the 12th day of January, 1871.

8. That on the day of said sale, as advertised, the said Rinaldo P. Smith, as the representative of his firm, was present, and the said entire property being offered for sale by the said Lawson, he, the said Smith, in a loud voice, gave formal notice of the prior lien of his firm upon all the land, excepting the distillery premises, for the sum of $8,666.44, and thereupon made a bid of one dollar per acre, subject to said lien; but the said Lawson then and there announced that he was authorized to give a clear title to the whole

property and declined to entertain the bid of the said Smith, and, no one else bidding, the said Lawson bid in the entire property for the United States at $4,229.50, which he claimed to be the amount due the United States, with costs of sale; and one year thereafter, to wit, on the 12th day of January, 1872, the said A. M.
6 Lawson, as deputy collector, did by his deed of that date and duly recorded, convey the entire property to the United States, and thereby defeated and annulled the prior lien of Smith, Ellett & Company and caused them to lose the entire debt due from the said Stephens as aforesaid.

9. This petitioner is advised and believes, and so charges, that the proceeding and sale above recited, whereby the United States acquired the title to said land and defeated the lien of said firm was in open violation of section 3207 of the Revised Statutes, which was then in full force and should have governed the proceeding of the United States in the premises; and that the officers of the United States, having abundant notice of the prior lien of the said Smith, Ellett & Company, should have commenced a proceeding in the United States District Court for said district in conformity with the provisions of the statute above cited, to which proceeding the said Smith, Ellett & Company should have been made parties, and whereby their prior lien should have been audited, adjusted and paid out of the proceeds of such sale in preference to the claim of the United States, as provided by such statute; and that, by adopting the summary proceeding which was resorted to in the sale of said land, being the same authorized by sections 3197 and 3198, Revised Statutes, in cases where no prior liens exist, the United States practically proclaimed to the whole world, just as its agent who made the sale actually did, that there was no valid prior lien on said land and that a clear title was passed by the sale.

10. That the United States accepted the conveyance so made and held the property by virtue thereof for many years, collecting the rents and profits, and that the first notice this petitioner had of its relinquishment of its holding was through an official letter from Acting Commissioner of Internal Revenue Wilson, bearing date January 7, 1895, in which it was stated that by a
7 conveyance made in October, 1888, the United States had divested itself of its title to said land.

11. That, after said sale and conveyance as aforesaid, the said Smith did, as the representative of his said firm, make every effort to collect the said debt from the said George J. Stephens in said Greene county, and to that end, at considerable expense, retained counsel learned in the law; but he was advised that the United States, by its summary proceeding, had taken over the title to the mortgage land and defeated his lien thereon, and the said Stephens, having no other property against which he could proceed, his only recourse lay, first, in redeeming the property within one year under the provision of section 3202, Revised Statutes, by paying to the deputy collector the full amount of $4,229.50 claimed to be due from said Stephens to the United States, or, second, in a

demand of indemnity from the United States; but the said firm, being wholly unable pecuniarily to advance that large sum of money and having serious doubts whether the mortgaged property was at that time fairly worth that amount in addition to their mortgage lien, and they were, therefore, unable to redeem said property, and neither the said firms nor this petitioner has ever directly or indirectly received any portion of said debt so due from said Stephens as aforesaid, but the same is still due and unpaid in the full amount above stated.

12. That at the time of said sale and conveyance to the United States, the land of said Stephens, to which the said lien of the said Smith, Ellett & Company attached was amply worth the amount of their said lien and would have brought that amount and more at any fair and regular sale thereof at auction or otherwise.

13. That on the first day of January, A. D. 1875, the part-
8 nership existing between the said Rinaldo P. Smith and the said Francis M. Ellett and a certain William F. Larrabee, who had in the meantime become a partner, expired by limitation in the acticles of copartnership and was dissolved by mutual consent, and thereupon all the partnership assets of the old firm, including the debt due from Stephens, as aforesaid, passed to this petitioner by authority of the firm as settling partner, with the exclusive right to collect the same and sign valid acquittance therefor; and although this petitioner has repeatedly made demand upon the proper officers of the Treasury Department for payment of his said claim, the same has never been paid, or any part thereof, but. on the contrary, allowance and payment thereof has been refused.

Wherefore your petitioner prays judgment against the defendant for eight thousand six hundred and sixty-six dollars ($8,666.44) and forty-four cents, with interest thereon from the 12th day of January, 1871.

FRANK BLACKLOCK,
Executor of Rinaldo P. Smith, Representing the Former Firm of Smith, Ellett & Company,
By F. M. COX, *Attorney.*

CHARLES C. LANCASTER, *Of Counsel.*

DISTRICT OF COLUMBIA, *County of Washington, ss:*

Before me, a notary public in and for the District of Columbia, personally appeared Francis M. Cox, who, being duly sworn, deposes and says that he is the attorney for the petitioner named in
the foregoing petition, and that he is authorized by warrant
9 of attorney, duly executed by said petitioner and filed herewith, to verify said petition, and petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and set-offs, and that the facts therein stated are true to the best of his knowledge and belief.

FRANCIS M. COX.

Subscribed and sworn to before me this 27th day of September, 1904.

JOHN C. DAVIDSON,
Notary Public, D. C.

10 II.

General Traverse.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

And as to so much of the said amended petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

LOUIS A. PRADT,
Assistant Attorney General.

11 III.

Findings of Fact and Conclusions of Law.

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact.

I.

Special jurisdiction to hear and determine this case was conferred on the Court of Claims by act of Congress of May 27, 1902, in the following words:

"That jurisdiction is hereby conferred on the Court of Claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the Government of the United States on account of the sale, purchase, or occupation by the Government, through its internal-revenue officers, or others, of certain real estate of one George J. Stephens, in Greene County, Virginia, upon which the late firm of Smith, Ellett and Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the Government to plead the statute of limitation in bar of said claim is hereby waived: *Provided*, That said claimant file his petition within sixty days from the passage of this act in said Court of Claims, either at law or in equity as he may deem the rights of his case shall require; and the Government shall, upon notice served according to the rules and practice of said court, appear and defend against said suit, and

the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law."

II.

The firm of Smith, Ellett & Co., which was composed of Rinaldo P. Smith and Francis M. Ellett, was engaged in business as leather and commission merchants in Baltimore, Md., from sometime
12 in the year 1867 or 1868 to January 1, 1870, when its personnel was changed by admitting therein as a full partner William F. Larrabee, and continuing in the same business under the firm name and style of Larrabee, Smith & Ellett, taking over the entire assets of Smith, Ellett & Co. The said firm of Larrabee, Smith & Ellett was subsequently, to wit, January 1, 1875, dissolved by limitation. It appears that said Rinaldo P. Smith was settling partner for each of said firms.

Said Rinaldo P. Smith filed his petition herein June 28, 1902, and having subsequently died, Frank Blacklock, his executor, was duly substituted as claimant herein January 14, 1903.

III.

On October 26, 1869, George J. Stephens, a distiller and tanner, of Greene County, Virginia, was indebted to the firm of Smith, Ellett & Co. in the sum of $7,000, already due, and the further sum of $2,000 to become due in the course of future dealings. Being so indebted and to secure the same he executed the following instruments in writing:

[Int. Revenue, 2. Mortgage cancelled Oct. 26, 1869. Stamp here, Two dollars. 2]

"On demand I promise to pay to Smith, Ellett and Company the sum of four thousand dollars, value received.

"Witness my hand and seal, this 26th day of October, 1869.

"G. J. STEPHENS. [SEAL.]

"Witness:

"J. R. TUCKER."

"This deed, made this 26th day of October, 1869, between George J. Stephens, of Greene County, Virginia, of the first part; Wyatt S. Beazley, trustee, of said county and State of the second part, and Rinaldo P. Smith, Francis M. Ellett, doing business under the style and firm of Smith, Ellett & Co., of Baltimore, and State of Maryland, of the third part:

"Whereas the party of the first part is indebted to the parties of the third part, by bond of even date with this deed, in the sum of four thousand dollars; and whereas the parties of the third part have heretofore accepted drafts of the party of the first part, which are now current, and not yet due and payable, for the accommoda-

tion of the said party of the first part, for the sum of three thousand dollars; and whereas the parties of the third part have agreed, for the further accommodation of said party of the first part, to accept from time to time, as he may need, his drafts on them for the further sum of two thousand dollars;

"And whereas it has been further agreed between the said party of the first part and the parties of the third part to renew the said acceptances from time to time, and when any shall be paid by the said party of the first part to give him the privilege to draw again upon the said parties of the third part for the amount so paid, which they have for like accommodation agreed to accept, so that there shall always be on their part absolutely for his accommodation by said acceptances of a sum equal to five thousand dollars, in addition to said bond of four thousand dollars;

13 "And whereas it is agreed that this course of dealing shall continue for the period of three years from this date;

"And whereas the party of the first part is anxious to secure as well the bond aforesaid as the acceptances already made and given by the parties of the third part, as those hereafter to be made and given as aforesaid, to the amount of five thousand dollars;

"Now, this deed witnesseth: That the party of the first part doth grant to the party of the second part a certain tract of land containing about 400 acres, more or less, in the county of Greene, and State of Virginia, lying on the Rockingham turnpike, about four miles from Stannardsville, upon which said party of the first part now resides, with the mansion house and all other buildings thereon, including the tannery and distillery thereon and all things appurtenant thereto, in trust to secure the said bond of four thousand dollars, and all the acceptances already made and given as aforesaid, now current and to become payable, and all acceptances to be hereafter made and given as aforesaid, and all which may be made and given for renewal of former ones, or to replace the money paid by the party of the first part in taking up former ones as aforesaid, or in any other manner as stated in the premises, so as the same shall not exceed the sum of five thousand dollars.

"And if the said party of the first part shall faithfully comply with the contract made and entered into this day with the parties of the third part for the delivery to them of goods for sale on consignment, or in default of such delivery for the payment of damages for such failure, then the parties of the third part shall not be allowed to require a sale under this deed for three years from this date. But sale may be so required if the said party of the first part shall at any time fail to comply as aforesaid with the terms of said agreement.

"And the party of the first part doth covenant that he will warrant generally the property hereby conveyed.

"Witness the following signature and seal:

"G. J. STEPHENS. [SEAL.]
"WYATT S. BEAZLEY, *Trustee.* [SEAL.]

"[U. S. Internal-revenue stamp here.]"

Said deed of trust was duly acknowledged and recorded among the land records of said Greene County, Va., on the 30th day of October, 1869, which property is shown to have been worth more than $3,000 at the time of the execution of said trust deed.

IV.

Upon the change of the firm of Smith, Ellett & Co., and the formation of the new firm of Larrabee, Smith & Ellett, in January, 1870, the said Stephens debt, consisting of trust deed and note aforesaid, became the partnership property of the firm of Larrabee, Smith & Ellett. On the 1st day of November, 1870, said debt, secured by the said deed of trust, amounted to the sum of $8,666.44, and about 1873 or 1874, during the five years' existence of the firm of Larrabee, Smith & Ellett, the said Stephens debt was sold by Rinaldo P. Smith and Francis M. Ellett, his copartners, for a full and valuable consideration to the said William F. Larrabee
14 in his individual capacity, and the said Francis M. Ellett directed the bookkeeper of the said firm to transfer the said Stephens debt to William F. Larrabee on the books of said copartnership. Whether said transfer was made as directed does not appear. It does appear that the said Stephens debt was not thereafter carried on the books of said copartnership as an asset of said firm, or of the subsequent firm of Smith, Ellett & Co., organized after the dissolution of the firm of Larrabee, Smith & Ellett in 1875.

V.

Subsequent to the passage of the act of May 27, 1902, to wit, November 17, 1903, Frank Blacklock, executor of said Rinaldo P. Smith, and John T. Morris, surviving executor of the estate of William F. Larrabee, deceased, entered into the following agreement:

"This agreement, made this 17th day of November in the year one thousand nine hundred and three, between Frank Blacklock, executor of Rinaldo P. Smith, of the first part, and John T. Morris, surviving executor of William F. Larrabee, of the second part, all of Baltimore city, in the State of Maryland.

"Whereas William F. Larrabee at the time of his death was the equitable assignee of a certain claim against the United States Government arising out of the sale of property in Virginia by the Government in disregard of the claim of the firm of Smith, Ellett & Company as mortgagees thereof.

"And whereas Rinaldo P. Smith was duly authorized and fully empowered to prosecute said claim against the Government and take all necessary steps therefor, under an agreement with Edward Otis Hinkley, one of the executors of William F. Larrabee, now deceased, whereby said Rinaldo P. Smith should receive one-half of the amount realized thereon, without any liability of the estate of William F. Larrabee for any costs or expenses incurred in connection therewith.

"And whereas an act of Congress was obtained by said Rinaldo P.

Smith in his lifetime giving jurisdiction to the Court of Claims to try such case upon the suit of said Rinaldo P. Smith, and suit was brought and is now pending in the Court of Claims, the said Frank Blacklock, executor of Rinaldo P. Smith, having been substituted as plaintiff therein.

"Now, therefore, this agreement witnesseth that said John T. Morris, surviving executor of William F. Larrabee, doth agree that the said Frank Blacklock, executor of Rinaldo P. Smith, shall prosecute said suit and take all necessary steps for the collection of said claim, and that the said John T. Morris, surviving executor of William F. Larrabee, doth agree that all the rights of said John T. Morris, executor of the estate of William F. Larrabee, shall be embraced in and fully concluded by the said litigation. And it is further agreed that should recovery be had in said case, one-half of the amount so recovered, without deducting costs, expenses, or counsel fees, shall be paid over by the said Frank Blacklock, executor of Rinaldo P. Smith, to John T. Morris, executor of William F. Larrabee, when said Frank Blacklock, executor, shall receive the same.

"And this agreement further witnesseth that it is distinctly understood that the said John T. Morris, executor of William F. Larrabee, shall not incur or be in anywise responsible for any expense whatever in connection with said claim or said litigation, but is to receive one-half of the amount for which judgment may be recovered as aforesaid, without any deduction, except for the executor's commission as allowed by the orphans' court."

The above agreement was duly approved and authority given the respective parties thereto to execute the same by the orphans' court of Baltimore city on November 17, 1903.

VI.

In the month of August, 1869, there was due and unpaid from the said George J. Stephens to the United States Government delinquent internal-revenue taxes, which had accrued, to wit, from July, 1867, to August, 1869, and for which payment had been demanded prior to October 26, 1869, amounting to the sum of $4,000. In order to satisfy said taxes, together with penalties authorized by law, the collector of internal revenue for that district of Virginia, through his deputy, A. M. Lawson, during the month of December, 1870, distrained the distillery buildings and about 3 acres of land upon which the distillery stood, and advertised said property for sale. Pending said advertisement and prior to the sale, the distillery buildings and their contents, including a quantity of whisky, were destroyed by fire, and in consequence thereof and before the day set for the sale the said collector extended his distraint so as to include the remainder of the said Stephens's land, amountng in all to about 525 acres, which included the land included by the said Smith, Ellett & Co. deed of trust, and advertised all of said land for sale.

In pursuance of said advertisement said Deputy Collector Lawson, on the 12th day of January, 1871, offered all of the said Stephens's lands for sale at public auction, and the said Rinaldo P. Smith, being

present as a member and representative of the said firm of Smith, Ellett & Co., gave formal notice of the Smith, Ellett & Co. deed of trust lien, which he stated was a prior lien to that of the Government, and protested against the sale of the land except as subject to said lien. Deputy Collector Lawson proceeded with the sale, and the property was bid in for the Government of the United States for the sum of $4,239.50, and one year thereafter, to wit, January 12, 1872, said A. M. Lawson, as deputy collector of internal revenue, executed a deed of conveyance to the United States Government, the $4,239.50 being the amount of delinquent taxes due, penalties for nonpayment thereof, and costs of distraint and sale.

VII.

The deed executed by Deputy Collector Lawson to the United States is as follows:

"This indenture made the 12th day of January, in the year of our Lord one thousand eight hundred and seventy-one, the said A. M. Lawson, deputy collector for B. B. Botts, collector of the sixth collection district of the State of Virginia, party of the first part, and United States of America, party of the second part, witnesseth:

"That whereas on the twelfth day of January, in the year of our Lord one thousand eight hunderd and seventy-one, the said A. M. Lawson, party of the first part, having first duly advertised
16 as required by law the time, terms, and place of sale of certain property hereinafter described, as belonging to George J. Stephens, of the county of Greene, in the district & State aforesaid, for delinquent taxes due to the United States from said George J. Stephens, did offer for sale and proceed to sell said property hereinafter described to the highest bidder, in accordance with law and the terms of the notice heretofore given in that behalf; and whereas the United States of America being duly declared the highest bidder, they having offered the sum of four thousand two hundred and thirty-nine 50/100 dollars, the highest bid made, such amount so offered, according to terms of sale, to include and cover all taxes and accrued penalties on account of nonpayment of taxes due from July, A. D. 1867, to August, A. D. 1869, denominated 'delinquent taxes,' and to also include all interest and expenses of sale in this behalf.

"Now, therefore, by virtue of the power in him vested by law and in accordance with law, the said A. M. Lawson, party of the first part, having sold as aforesaid, doth hereby convey, with special warranty, all the following described property seized and sold as the property of George J. Stephens aforesaid for delinquent taxes, i-terest, and penalties amounting to the sum of four thousand dollars and the further sum of two hundred thirty-nine 50/100 dollars cost of sale, making in all the aforesaid sum of four thousand two hundred thirty-nine 50/100 dollars, the amount bid by the United States.

* * * * * * *

"In witness whereof, the said party of the first part has hereunto set his hand and seal, this 12" day of January, in the year of our Lord eighteen hundred and seventy-two.

"A. M. LAWSON, [SEAL.]
"*Deputy Coll. 6 Dist., Virginia.*

"ALBEMARLE COUNTY, *To wit:*

"I certify that Alexander M. Lawson personally appeared before me in my county aforesaid and acknowledged the above deed to be his act, this 18" Nov., 1873.

"A. ROBT. McKEE, *J. P.*

"Examined and approved this 18" day of September, 1872.
"R. W. HUGHES,
"*U. S. Dist. Att'y, W. D. Va.*
"Pr. J. S. STATES, *Asst.*

"In Greene County court, clerk's office, 25" Nov., 1873, this deed from A. M. Lawson, deputy U. States collector 6" collection district to United States, is filed, and being duly acknowledged by said Lawson is admitted record.

"Teste.

"WM. T. LEWIS, *Clk.*

"A copy
"Teste.

"Z. R. PAGE, *Clerk.*"

VIII.

On October 6, 1888, the United States Government, by Joseph H. Miller, Commissioner of Internal Revenue, for the sum of
17 $500, and pursuant to a regular sale on June 12, 1888, to one Willie G. Stephens, for said amount, executed the following deed of conveyance:

"Quitclaim Deed.

"Whereas the property hereinafter mentioned and described was, at or on the premises, on the twelfth day of January, eighteen hundred and seventy-one, offered for sale at public auction for internal-revenue taxes due from George J. Stephens;

"And whereas the said property was then and there declared purchased for the United States by A. M. Lawson, deputy collector of internal revenue in the sixth district of the State of Virginia;

"And whereas the same was not redeemed within one year after said sale;

"And whereas, after the expiration of one year from the time of said sale, to wit, on the twelfth day of January, eighteen hundred and seventy-two, the said A. M. Lawson, in his capacity of deputy collector of internal revenue, executed to the United States a deed

of the same, and deposited said deed with the then U. S. Attorney, R. W. Hughes;

"And whereas, under the authority conferred upon me by section thirty-two hundred and eight of the Revised Statutes of the United States, as amended by section three of the act of March 1st, 1879, and by and with the approval of the Secretary of the Treasury, the same was, in a letter addressed to Collector H. Shepperd under date of May the eighth, eighteen hundred and eighty-eight, by me ordered to be sold; and whereas, after due notice the same was sold at public vendue at or on the premises, in the State of Virginia, on the twelfth day of June, eighteen hundred and eighty-eight, to Miss Willie G. Stephens, for the sum of five hundred dollars, she, the said Willie G. Stephens, being the highest bidder.

"Now, therefore, know all men by these presents, that I, Joseph S. Miller, Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury and by virtue of the authority conferred upon me by said section thirty-two hundred and eight of the Revised Statutes of the United States, amended as aforesaid, and in consideration of said sum of five hundred dollars to the United States before the delivery hereof, well and truly paid, the receipt whereof, by certificate of deposit No. 121 for five hundred dollars issued by the Peoples' National Bank of Lynchburg, under date of May the third, eighteen hundred and eighty-eight, is hereby acknowledged, have granted, bargained, and sold, and by these presents, in my said official capacity, do give, grant, bargain, sell, convey, and confirm unto the said Miss Willie G. Stephens's devisees (she having herself died since the sale), viz, Derilus S. Deane, Benjamin C. Sims, M. E. Stephens, R. N. Stephens, and Lelia Stephens, in equal portions subject to the probated last will of Willie G. Stephens, their heirs and assigns, all right, title, and interests of the United States *at the time of said last-named sale* in the premises sold as aforesaid and described as follows, to wit:"

(Here follows the description.)

"All of said tracts of land are situated in the county of Greene, in the State of Virginia, this description being identical with that in the above-mentioned deed of Deputy Collector A. M. Lawson
18 to the United States, dated January 12th, 1872. Reference is here made to said deed, which was recorded in the office of Greene County court clerk on the 25th day of November, 1873.

"The said devisees of Willie G. Stephens, to wit, Derilus S. Deane, Benjamin C. Sims, M. E. Stephens, R. N. Stephens, Lelia Stephens.

"In unequal proportions and subject to the provisions of the last will and testament of the said Willie G. Stephens, executed on the 12th day of June, 1888, and probated in Greene County court at the June term, 1888.

"To have and to hold the same and all the privileges and appurtenances thereto belonging to the said grantees, their heirs and assigns forever, free of any claim on the part of the United States.

"In witness whereof I have hereunto set my hand and seal this sixth day of October, one thousand eight hundred and eighty-eight.

"[SEAL.] JOS. S. MILLER,

Commissioner of Internal Revenue."

IX.

Some time in April, 1889, Reuben S. Thomas, trustee, successor in trust deed of Smith, Ellett & Co., having succeeded Wyatt S. Beazley, former trustee, then deceased, advertised the said Stephens property for sale under the statutes of Virginia, but was precluded from selling the same by injunction proceedings instituted by the then owners of the property in the circuit court of Greene County, Va. It does not appear that any other effort was made by claimant to foreclose his trust deed.

X.

The following instrument was executed by Smith, Ellett & Co. January 25, 1870:

BALTIMORE, *January* 25, '70.

We hereby give our consent to the use of the distillery premises of Geo. J. Stephens, situated on the Harrisonburg turnpike, about four miles from Stannardsville, and which premises contain about three acres of land, more or less, immediately surrounding the distillery building, and which building is contained thereon or comprised therein by said Geo. J. Stephens, subject to the provisions of the internal rev. law, and that the lien of the United States for taxes and penalties *hereafter incurred* shall have priority to the extent of the *above-mentioned premises* of a certain deed of trust executed by said Geo. J. Stephens for our benefit, and whereof Wyatt S. Beazley is trustee, and that in case of the forfeiture of the said distillery premises, or any part thereof, the title of the same shall rest in the United States, discharged from said deed of trust.

Given under our hands and seals this twenty-fifth day of January, A. D. 1870.

R. P. SMITH, [SEAL.]
FRANK M. ELLETT, [SEAL.]
Of Smith, Ellett & Co.

Witness-:
W. M. WOODS.
J. Q. H. SMITH.

19 IV.

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the petition be dismissed.

20 V.

Opinion.

Opinion.

BOOTH, *J.*, delivered the opinion of the court:

Claimant's right of recovery in this case is predicated upon the priority of the lien of a trust deed duly executed and recorded in his favor by one George J. Stephens, a distiller of Greene County, Va., over the distraint and sale of the same property by the defendants through their proper officer, for the collection of delinquent internal-revenue taxes, it being asserted that the defendants, by distraint and sale of the land of said Stephens, precluded claimant from realizing upon his security.

The act of May 27, 1902, set forth in Finding I, confers upon this court jurisdiction to hear and determine the questions at issue according to the usual rules and practice of the court, commands proper defense for the Government, defines the subject-matter of the claim, waives the statute of limitations, and its evident purpose is to impose upon the court the duty of a full judicial investigation of the entire subject-matter from its inception to its close.

The findings disclose the trust deed aforesaid to have been executed on October 26, 1869. It also appears that the delinquent taxes for which distraint and sale was had, accrued to the defendants from July, 1867, to August, 1869, and at the time of the sale were due and unpaid, previous demand for payment having been made. The act of July 13, 1866 (14 Stats. L., 107), creating the lien in favor of the defendants, uses this language:

"And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, or on which the said lien exists, for the payment of the sum due as aforesaid, with interest and penalty for nonpayment, and also of such further sum as shall be sufficient for the fees, costs, and expenses of such levy. And in all cases of sale, as aforesaid, the certificate of such sale shall transfer to the purchaser all right, title, and interest of such delinquent in and to the property sold;" which from its comprehensive nature precludes all doubt of the intent of Congress to embrace within its operation every species of property subject to ownership. It will be observed that the only condition precedent imposed upon the officer invoking its jurisdiction is the *refusal to pay the same after demand.* If proper demand for payment has been made, the statute relates back to

the *time when* the taxes became due and the lien of the defendants attaches as of that date to the property belonging to the person from whom the tax was due at the date of the demand. The United States *v.* Pacific Railroad *et al.* (1 Fed. Rep., 97).

21 Claimant asserts as a matter of law that the duty of proving priority of defendants' lien rests upon their ability to establish by competent evidence a strict compliance with the statutory provisions creating the same. This is a proceeding at law to recover the amount mentioned in claimant's trust deed, founded upon the alleged interference of the defendants in the foreclosure of the same whereby the security and the debt was lost to claimant. It involves a collateral attack upon the proceedings by which title to the Stephens land became vested in the defendants, and we are unaware of any rule by which the burden of proof is shifted to the defendants to establish their contention in the first instance when assailed by claimant with an assertion of superior rights and title. Claimant must recover, if at all, not upon weakness of defendants' title, but upon the strength and superiority of his own. The proof, however, does show that demand was made prior to execution of claimant's trust deed, and the recitals in the deed, which by the statute creating the lien are made *prima facie* evidence of the facts contained therein, warrant the court in holding that the statute was fully complied with until the contrary is made to appear. We are not to presume that a public officer, charged with the performance of a particular duty, discharges the same contrary to the statute. The contrary presumption obtains, and the duty of overturning it rests upon the party alleging a failure in this particular. Therefore we conclude that in so far as time is concerned the lien of the defendants attached to the property belonging to said Stephens prior to the lien of claimant created by the trust deed of 1869.

The proceeding under which distraint and sale of the Stephens property was made by the defendants is next attacked, claimant contending that the defendants elected to pursue a method of enforcement of their lien contrary to the statute in such case provided. That the deed conveying the Stephens premises to the United States vested in them merely his interests therein at the time of sale, and being of record and purporting to convey the fee, absolutely precluded claimant from asserting his alleged prior lien and realizing upon his security by foreclosure of the same.

Under the statute in force at the time of the distraint and sale of the Stephens premises by the defendants in January, 1871, there were open to them two methods of enforcing their lien. The officer in charge elected to pursue the course prescribed by section 30 of the act of July 13, 1866 (14 Stat. L., 108). He might lawfully have proceeded under section 106 of the act of July 20, 1868 (15 Stat. L., 167). In either event his conduct would have been approvable in law. No positive duty was imposed, as contended by claimant, to proceed under the act of July 20, 1868. The material portion of that act with which we are now concerned reads as follows:

"That in any case where there has been a refusal or neglect to pay any tax imposed by the internal-revenue laws, and where it is lawful

and has become necessary to seize and sell real estate to satisfy the tax, t[illegible] Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed, in a district or circuit court of the United States, to enforce the lien of the United States. * * * And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall be brought into court as provided in other suits in chancery in said courts."

The language of the statute, "may, if he deems it expedient," direct a bill in chancery to be filed, does not of itself import a command, and when taken with reference to the context of the whole act in which it appears vests the officer empowered by law to make the distraint with discretion as to the expediency of invoking the aid of this statute in enforcing the lien as the circumstances of the case may require. It is clearly directory and does not repeal the act of July 13, 1866, respecting the mode of enforcement of a lien of the United States for delinquent internal-revenue taxes, as prescribed therein. The remedies given by the two sections of the different statutes are concurrent and not conclusive. Alkan *v.* Bean (8 Bissel, 89).

We can not assent to the proposition that the decision of the court in Mansfield *v.* Excelsior Company (135 U. S., 326) is hostile to this construction. That was a case where taxes had accrued against the lessee of a distiller and the property of the same was seized by the collector of internal revenue for taxes due from the distiller to the Government by the summary mode of notice and publication provided for in Revised Statutes, section 3196. The court held that the sale in this instance passed to the purchaser whatever interest the delinquent distiller had at the time, but that the same would not affect the interest in the premises either of the owner of the fee or of a third person having a lien thereon, even though the Government held a waiver executed by the owner of the fee consenting that the distillery premises might be used by the distiller subject to the provisions of law. That is to say, an execution of the waiver by the owner in fee of the premises consenting to the use of the premises for distillery purposes did not otherwise affect his right or title in the property.

Not, therefore, being called upon to determine the wisdom of the officer's choice, because of his election, as to which method he will pursue in enforcing his lien under the statutes, we are of the opinion that the proceedings conducted by him were clearly within the statute he elected to invoke and in no wise contrary thereto.

We are also unable to see how the acts of the defendants in the premises prejudiced the rights of the claimant or in any way impoverished his security, which was in the form of a trust deed. The protest made by claimant against the sale of the Stephens land at the time thereof could not and did not add to the weight which would be given to the recording of the trust deed in the county and State where executed. Constructive notice, by compliance with the recording acts of Virginia, notified the purchaser of the existence of the claimant's lien. The doctrine of *caveat emptor* applied. The deed exe-

cuted by the purchaser of the premises to the United States, bearing date of January 12, 1872, could not and did not convey any other interest in the premises except that belonging to Stephens at the time of the attachment of their lien. Its efficiency as an instrument of conveyance was not dependable in law upon the terms used to describe the estate conveyed. If attempt was made to convey that which Stephens did not have the instrument was a nullity. Mansfield *v.* Excelsior Co., *supra.*

23 In the view we take of the case we are not called upon to decide the extent of Stephens's interest in the property at the time of the attachment of defendants' lien. Claimant's lien, being subsequent to that of the defendants, imposed upon him the necessity of protecting his security as against the superior rights of the defendants, and the burden of establishing irregularities in the procedure by which defendants acquired title to the Stephens land is imposed upon the claimant. He was not estopped by any act of the officer of the Government from redeeming the premises sold by the defendants. The statute under which the sale was made expressly provided:

"The owners of any real estate sold as aforesaid, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the land sold as aforesaid, or any particular tract thereof, at any time within one year after the sale thereof, upon payment to the purchaser, or, in case he can not be found in the county where the land to be redeemed is situate, then to the collector of the district in which the land is situate, for the use of the purchaser, his heirs, or assigns, the amount paid by the said purchaser, and interest thereon at the rate of 20 per centum per annum."

No matter what terms were used in the certificate of sale to describe the estate sold under this statute, the claimant had ample power and authority to protect his lien by redemption of the premises sold and thus becomes subrogated to all the rights of the defendants in the same. The defendants were clearly and unequivocally entitled to enforce their lien to the extent of Stephens's interest in the property at the time it attached under this statute, irrespective of the question of the priority of the same. The sale was made January 12, 1871, and the deed from Collector Lawson to the United States bears date of January 12, 1872, fully in conformity with the above statute of redemption.

It further appears from the findings that claimant made no effort to enforce his lien until sometime in the year 1899, after the premises had been sold by the Government to another person, and when they so attempted were prevented by injunction with proceeding therewith.

In our opinion claimant not having availed himself of his rights under the law in protecting his lien, which were ample and comprehensive in every respect and which were in nowise unlawfully interfered with by the defendants, we will not impute to them any liability for assertion of their claim in the manner it was asserted and enforced. The petition is therefore dismissed.

24 VI.

Final Judgment.

At a Court of Claims held in the City of Washington on the twenty-ninth day of January A. D. 1906, judgment was ordered to be entered as follows:

The Court on due consideration of the premises do order, adjudge and decree that the petition of the claimant, the said Frank Blacklock, executor of Rinaldo P. Smith, representing the firm of Smith, Ellett & Co., be dismissed.

25 VII.

Claimant's Application for and Allowance of Appeal.

From the judgment rendered in the above entitled cause on the 29th day of January 1906, the claimant by his attorneys on the 21st day of March 1905, makes application for and gives notice of an appeal to the Supreme Court of the United States.

F. M. COX,
C. C. LANCASTER,
Attorneys for Claimant.

Allowed in open Court June 8, 1906.

STANTON J. PEELLE,
Chief Justice.

26 VIII.

In the Court of Claims.

No. 22911.

FRANK BLACKLOCK, Executor of Rinaldo P. Smith, Representing the Firm of Smith, Ellett & Co.,
v.
THE UNITED STATES.

I, Archbold Hopkins, Chief Clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above entitled cause, of the findings of fact by the Court and the conclusion of law thereon, of the opinion of the Court, of the judgment of the Court, of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington this twelfth day of July, A. D. 1906.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 20,308. Court of Claims. Term No. 343. Frank Blacklock, executor of Rinaldo P. Smith, representing the firm of Smith, Ellett & Co., appellant, *vs.* The United States. Filed July 18th, 1906. File No. 20,308.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 65.

FRANK BLACKLOCK, EXECUTOR OF RINALDO P. SMITH, REPRESENTING THE FIRM OF SMITH, ELLETT & CO., APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims, entered January 29, 1906, dismissing the petition of the claimant and appellant, Frank Blacklock, executor of Rinaldo P. Smith, representing the firm of Smith, Ellett & Co. which was filed in that court under the authority and jurisdiction conferred by the provisions of the special act of Congress, approved May 27, 1902, chapter 887, entitled "An act for the allowance of certain claims for stores and supplies reported by the Court of Claims under the provisions of the act approved March 3, 1883, and commonly known as

the Bowman act, and for other purposes" (U. S. Stats. L., vol. 32, part 1, pp. 243, 244).

The act provides as follows:

"That jurisdiction is hereby conferred on the Court of Claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the Government of the United States on account of the sale, purchase, or occupation by the Government, through its internal-revenue officers, or others, of certain real estate of one George J. Stephens, in Greene county, Virginia, upon which the late firm of Smith, Ellett and Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the Government to plead the statute of limitations in bar of said claim is hereby waived: *Provided,* That said claimant file his petition within sixty days from the passage of this act in said Court of Claims, either at law or in equity, as he may deem the rights of his case shall require; and the Government shall, upon notice served according to the rules and practice of said court, appear and defend against said suit, and the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law."

The petition of Rinaldo P. Smith was filed in the court below June 28, 1902. Mr. Smith having subsequently died, Frank Blacklock, his executor, was duly substituted as claimant herein January 14, 1903 (Finding II, Record, p. 7).

The petition of the claimant, after stating the facts of the case, referred to the jurisdictional act and the law applicable thereto, and, as will be seen, prayed judgment against the defendants for $8,666.44, with interest thereon from the 12th day of January, 1871 (Record, p. 5).

The material facts of the case, as disclosed by the findings, are these:

On October 26, 1869, George J. Stephens, a distiller and tanner, of Greene county, Virginia, who owned a farm, upon which he resided in his mansion house, and upon which his

distillery and tannery were also situated, being indebted to the firm of Smith, Ellett & Co. (composed of Rinaldo P. Smith and Francis M. Ellett, of Baltimore, Maryland) in the sum of $7,000, already due, and the further sum of $2,000, to become due in the course of future dealings, executed to one Wyatt S. Beazley, as trustee, a mortgage deed of trust on his farm to secure the indebtedness thus due to Smith, Ellett & Co. This farm he therein described as "A certain tract of land containing about 400 acres, more or less, in the county of Greene and State of Virginia, lying on the Rockingham turnpike about four miles from Stannardsville, upon which said party of the first part now resides, with mansion house and other buildings thereon, including the tannery and distillery thereon and all things appurtenant thereto." This deed of trust was duly acknowledged and recorded among the land records of Greene county on October 30, 1869 (Finding III, Record, pp. 7, 8, 9).

On January 25, 1870, Smith, Ellett & Co. executed a waiver of the priority of their lien on the distillery premises, "which premises constitute about three acres of land, more or less, immediately surrounding the distillery building," in favor of the United States, in conformity with the act of July 20, 1868 (ch. 168, sec. 4). This waiver is set forth *in extenso* in Finding X (Record, p. 14).

On the first day of November, 1870, said debt, secured by said deed of trust, amounted to $8,663.44 (Finding IV, Record, p. 9). The Court of Claims does not set forth in its findings the value of the property, deeming it sufficient for the purposes of this appeal to find that it was *"more than* $3,000" (Finding III, Record, p. 9); but as the counsel for the Government in his requests for findings, at page 121 of the printed record in the Court of Claims, requested the court to find from the evidence that "the value of the Stephens property sold by the Government, upon which the Smith, Ellett & Co. deed of trust was a lien and *had not been waived in favor of the Government,* was, at the time of sale, about

$8,000," and claimant's counsel, at page 105 of the same record, requested that the value of the same property be found $10,500, or upward, the real value, for the purpose of this argument, may be fairly assumed to be about the same as the amount due on claimant's lien.

In the month of December, 1870, in order to satisfy the sum of $4,000 delinquent internal-revenue taxes, which had been accumulating since July, 1867, the collector of internal revenue for that district, through his deputy, A. M. Lawson, distrained the distillery premises, consisting of three acres of land, upon which the distillery stood, and a quantity of whiskey stored therein, and advertised said property for sale. Pending said advertisement and prior to the sale, the distillery buildings and their contents were destroyed by fire, and *in consequence thereof* and before the day set for sale the said collector extended his distraint so as to include the remainder of said Stephens land to which the said Smith, Ellett & Co. lien attached and had not been waived, and advertised the whole for sale, as the property of George J. Stephens (Findings VI and VII, Record, pp. 10, 11).

In pursuance of said advertisement, Deputy Collector Lawson, on the 12th day of January, 1871, offered all of the said Stephens land outside of the distillery premises for sale at public auction, and said Rinaldo P. Smith, being present as a member and representative of his firm, gave formal notice of the Smith, Ellett & Co. deed of trust lien, which he stated was a prior lien to that of the Government, and protested against the sale of the land, except as subject to said lien. Deputy Collector Lawson, ignoring this protest, proceeded with the sale of the land as the property of George J. Stephens, and the property was bid in for the Government for the sum of $4,239.50, being the amount of delinquent taxes due, penalties for non-payment thereof, and costs of distraint and sale (Finding VI, Record, p. 11).

On January 12, 1872, Deputy Collector Lawson executed to the United States a deed in fee simple of all the Stephens

land excepting the distillery premises, specifying therein that the land was "seized and sold as the property of George J. Stephens," and with an unusual clause of special warranty. See deed, set forth in full (excepting the description), Finding VII, Record, p. 11.

After having held the property under the Lawson deed for 16 years 6 months and 24 days (and, from the day of sale, 17 years 6 months and 24 days) the United States, through Joseph S. Miller, Commissioner of Internal Revenue, on October 6, 1888, conveyed the property to the heirs of Willie G. Stephens, a daughter of George J. Stephens, by *regular deed of bargain and sale,* in pursuance of a sale made to her by the deputy collector for that district on June 12, 1888, at public vendue for the consideration of $500. The words "quitclaim deed" were apparently written at the top of this deed by some clerk, and those words appear at the head of the deed as set forth in Finding VIII (Record, p. 12) of the Court of Claims, but they do not occur anywhere else in the deed, the operative words of which are *"give, grant, bargain, sell, convey, and confirm."* In addition to conveying the title obtained through the Lawson deed, which it recites, the Commissioner's deed especially conveys "all right, title, and interest of the United States *at the time of the last-mentioned sale* (June 12, 1888), which could have reference only to the *title by adverse possession,* which the Government had acquired by its holding for more than 15 years under the Lawson deed.

In April, 1889, claimant, having been informed of the reconveyance of the property to the Stephens heirs, had a successor appointed to the original trustee, then deceased, and instituted proceedings in Greene county to foreclose the mortgage, but was restrained by injunction from the Greene county court, the period of re-entry upon lands held adversely in Virginia being fifteen years (Virginia Code, 1849, ch. 149, sec. 1).

About the year 1873, or 1874, Rinaldo P. Smith and

Francis M. Ellett made an equitable assignment of their respective interests in the claim to William F. Larrabee, who had in the meantime become their copartner, for value, and, Larrabee having died in 1875, Edward Otis Hinkley, one of his executors, entered into an agreement with Rinaldo P. Smith, the settling partner of the dissolved firm, whereby Mr. Smith was "duly authorized and fully empowered" to prosecute said claim against the United States in the interest of said Smith and said Larrabee, the proceeds to be divided between Mr. Smith and the Larrabee estate. On November 17, 1903, John T. Morris, surviving executor of William F. Larrabee, executed an agreement under seal with Frank Blacklock, the appellant, expressly ratifying the former agreement between Hinkley (his deceased coexecutor) and Smith, and declaring that the Larrabee estate shall be fully concluded by the judgment herein, which agreement was duly approved by the Orphans' Court of Baltimore city and is of record there (Findings IV and V, Record, pp. 9, 10).

Opinion of Court of Claims.

The Court of Claims held, as appears from its opinion in the record, that under the statute in force at the time of the distraint and sale of the Stephens premises by the defendants, in January, 1871, there were open to them two methods of enforcing their lien. The court said: "The officer in charge elected to pursue the course prescribed by section 30 of the act of July 13, 1866 (14 Stats. L., 108). He might lawfully have proceeded under section 106 of the act of July 20, 1868 (15 Stats. L., 167). In either event his conduct would have been approvable in law. No positive duty was imposed, as contended by claimant, to proceed under the act of July 20, 1868" (Record, p. 16).

The court, it was observed, could not assent to the proposition on the part of the claimant that the decision of this court in *Mansfield v. Excelsior Company* (135 U. S., 326) is hostile to this construction.

The court below also held that there is a legal presumption that Deputy Collector Lawson, in making the sale, complied with all the requirements of law, and that the recitals in the deed warranted it in deciding that the statute was fully complied with, until the contrary was made to appear (Record, p. 16). And the court below overruled the contention and argument on the part of claimant that the statutes, as well as the general principles of law, regulating such sales imposed the burden of proving the regularity of his proceedings upon the deputy collector, and required such proof to appear in the recitals in his deed.

The court further held that the lien of the defendants on the Stephens land, outside of the distillery premises, was prior to that of appellant (Record, p. 17).

On January 29, 1906, the lower court entered a judgment dismissing the petition of the claimant, and from that judgment the claimant has appealed to this court (Record, p. 19).

Assignments of Error.

1. The Court of Claims erred in rendering the judgment entered by it herein on January 29, 1906, dismissing the petition of the claimant and appellant.

2. The Court of Claims erred in holding herein that, under the statutes of the United States in force at the time of the distraint and sale of the Stephens premises by the defendants, there were open to them *two* methods of enforcing their lien, and in not deciding that there was but *one* method open to them, viz., a proceeding in equity in a United States district court.

3. The Court of Claims erred in holding herein that the lien of the defendants on the Stephens land, outside of the distillery premises, was prior to that of claimant and appellant, and in not deciding that the priority of his lien, as

it appears of record, could not be disturbed by the neglect of defendants to collect their taxes monthly, as they became due, in violation of the mandatory provisions of the law of the United States.

4. The Court of Claims erred in holding herein that there is a presumption of law that Deputy Collector Lawson, in making such sale, complied with all the requirements of law, and that the recitals in his deed warranted the court in deciding that the statutes were fully complied with, and in not deciding that the statutes regulating such sales put the burden of proving the regularity of his proceedings upon the deputy collector, and required such proof to appear in the recitals in his deed, and that in default of such recitals no contrary proof at all is required.

5. The Court of Claims erred in not finding in favor of the claimant and appellant, and in not adjudging and deciding that he is entitled to recover against the United States herein the sum of $8,666.44, the amount of the principal of the said mortgage debt due by the said George J. Stephens, and secured by the said deed of trust executed by him, October 26, 1869, in favor of the said firm of Smith, Ellett & Co., with interest on the said sum at six per centum (the legal rate in the State of Virginia) from the time the said premises were seized by the defendants, and in not rendering a judgment herein in favor of the claimant and appellant against the United States for the said amount, unless the proofs in the case showed that the value of the said mortgaged premises, at the time they were seized by the defendants, was less than $8,666.44; and in that event the Court of Claims erred in not adjudging and deciding that the claimant and appellant was and is entitled to recover herein against the United States the full value of the said mortgaged premises at the time they were seized by the defendants, with interest thereon, as aforesaid, from the time they

were so seized, and in not rendering a judgment herein in favor of the claimant and appellant against the United States for the said amount.

The Statute Law of the Case.

The internal-revenue tax upon the occupation and productions of a tanner was repealed by the act of March 31, 1868, chapter 41 (15 Stats., p. 59), and therefore distillery taxes are alone involved in the case at bar.

From the first creation of the internal-revenue tax on distilled spirits by the act of August 5, 1861 (12 Stats., 292), to the present day there has been a specific lien to secure its collection *limited in terms to the distillery premises and its contents.*

Prior to 1866 the different classes of internal-revenue taxes, such as the income tax, the inheritance tax, the tax on the gross earnings of railroads and transportation companies, as well as the distillery tax, had each a separate statutory provision regulating the lien by which it was secured. But by the comprehensive act of July 13, 1866, chapter 184 (14 Stats., 98), which effected an entire repeal and re-enactment of the whole internal-revenue system, only two specific provisions for liens appear—one applicable by its terms to distillery taxes alone, and being a re-enactment of pre-existing provisions in that behalf, and the other appearing as a substitute for all the former specific liens, excepting for distillery taxes, being in terms similar to the pre-existing lien against transportion companies and of general application.

The lien for distillery taxes is found in section 32, at page 157, in the following words:

"That there shall be levied, collected, and paid upon all distilled spirits, upon which no tax has been paid according to law, a tax of two dollars on each and every proof gallon (reduced to 50 cents by act of July, 20, 1868, ch. 186), to be paid by the distiller, owner, or any person having possession thereof; and the tax *shall be a lien* on the spirits

distilled, on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, and the interest of the distiller in the lot or tract whereon the said distillery is situated, *from the time said spirits are distilled until said tax shall be paid.*"

The general lien covering all other classes of internal-revenue taxes is contained in section 1, at page 107, as follows:

"If any person, bank, association, company, or corporation liable to pay any tax shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation."

Both of the above general liens were modified and amended by the next succeeding Congress in the act of July 20, 1868, chapter 186, section 106 (15 Stats., 167), by the following provision:

"In any case where there has been a refusal or neglect to pay any tax imposed by the internal-revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. And *all persons having liens upon the real estate sought to be subjected to the payment of any tax, as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings,* and shall be brought into court as provided in other suits in said courts. And the said courts shall have and are hereby given jurisdiction in all such cases, and shall at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all

matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States shall therein be established, *decree a sale,* by the proper officer of the court, of such real estate and *the distribution of the proceeds of such sale,* according to the findings of the court in respect to the interests of the parties and of the United States."

The above section is substantially embodied in section 3207, Revised Statutes, with the omission of a few superfluous words, such as "if he deems it expedient," in the fifth line from the top.

The specific lien for distillery taxes was also further amended by the act of July 20, 1868, chapter 186, by requiring that:

1. In case of a mortgage or other lien on the distillery premises that the distiller, as a condition of the further continuance of his business, should procure from such lienor a written waiver in favor of the United States of the priority of his lien on the distillery premises, or failing in this that the distiller should execute to the United States a sufficient bond to indemnify against such lien (sec. 8).

2. That an additional condition be added to the distillery bond, to the end that "he will not suffer the lot or tract of land upon which the distillery stands to be encumbered by any mortgage, judgment, or other lien during the time in which he shall carry on said business (sec. 7).

The above amendments afford good proof that Congress did not intend that the general lien of 1866, above quoted, should apply to distillery taxes. Other contemporaneous and still existing statutory provisions to the same intent may be summarized as follows:

1. Every distiller is required, on commencing business and annually on May 1, to give a bond, with two sureties,

conditioned for the faithful performance of all his duties, which, of course, includes the payment of all taxes (act 1866, ch. 184, sec. 24, 14 Stats., 154; act 1868, ch. 186, sec. 7, 15 Stats., 127; Revised Statutes, sec. 3260).

2. Every distiller must provide a bonded warehouse as part of his distillery, which shall be in the exclusive custody of a Government storekeeper, and into which all spirits distilled shall at stated intervals in each month be duly entered for storage and *from which they shall not be removed until the tax is paid.* And at the time said spirits are so entered the distiller shall give his bond, known as a "warehousing bond," with one or more sureties satisfactory to the collector, *in double the amount of the tax* on the spirits, as specified in the entry, "conditioned that the principal named in said bond will pay the tax on said spirits *before removal from the distillery warehouse* and *within one year from the date of said bond*" (act 1868, ch. 186, secs. 15, 23, 15 Stats., 130, 135).

3. After the expiration of the warehousing period (which was at that time one year) the tax on the spirits so deposited became due from month to month according to the date of the deposit; and "if said tax shall not be paid on or before the last day of the month, as aforesaid, it shall be the duty of said collector to demand payment thereof, with ten per centum additional, in the manner prescribed by law; and if said taxes and ten per centum additional *are not paid within ten days after such demand,* it shall be lawful for the collector, or his deputy, to make distraint therefor as provided by law" (act 1866, ch. 184, sec. 11, 14 Stats., 150).

4. It is manifestly against conscience, and has, therefore, never been the policy of the Government, to collect taxes on spirits accidentally destroyed while in bond and in the custody of its officers. Prior to May 27, 1872, such taxes were

remitted through private acts of Congress from time to time, and, by a general law of that date, such taxes have been thenceforth expressly remitted (17 Stats., 162; sec. 3221, Revised Statutes).

Propositions on the Part of Appellant.

From the law and the facts of this case, the appellant maintains that the following propositions of law are established:

I. The Federal Government, since the passage of the act of July 20, 1868, chapter 106 (cited *ante*, p. 11), cannot enforce a lien for internal-revenue taxes against real estate (however clear may be its priority) in derogation of a duly recorded mortgage lien, *through the summary process of distraint;* and sale by that summary process can only convey the then existing interest of the delinquent tax-payer in the real estate so sold.

II. The Government never acquired any lien at all on the land in controversy, but only on the distillery premises; and, even if it had acquired such lien, it lost its priority to that of appellant through its long-continued negligence in not collecting its taxes monthly in conformity to its own mandatory laws.

III. The Lawson deed, as set forth in Finding VII (Record, p. 11), would not have been a valid conveyance of the property before the passage of the act of July 20, 1868, directing a proceeding in equity, because of its failure to set forth in its recitals the essential fact of a demand of the tax prior to October 26, 1869, when appellant's lien attached; and this fatal omission cannot be cured by any presumption that the officer discharged his duty.

IV. The taking by the United States of the vested property of the appellant in the Stephens land, through the un-

warranted process shown by the record, and the long-continued adverse holding thereof under the false title thus created and made of record, until the appellant's rights were barred by limitations, render the defendants liable to appellant in this proceeding for just compensation and full idemnity, including interest.

ARGUMENT.

I.

The Federal Government, since the passage of the act of July 20, 1868, chapter 186, section 106 (cited ante, p. 11), cannot enforce a lien for internal-revenue taxes against real estate (however clear may be its priority) in derogation of a duly recorded mortgage lien, through the summary process of distraint; and sale by such summary process can only convey the then existing interest of the delinquent tax-payer in the real estate so sold.

(*a*) This proposition is fully sustained by this court in the case of *Mansfield v. Excelsior Refining Co.* (135 U. S., 326). In that case, which was parallel in every essential particular to the case at bar, it was unequivocally decided that a sale of land by an internal-revenue collector for delinquent taxes under the summary process of distraint is not a valid or legal method of enforcing a lien in favor of the Government even on the distillery premises alone, and that, however clear may be the priority of the Government's lien over other lienors and vested interests in the property sold, the distraint sale and deed made in pursuance thereof, regardless of the terms of such deed, can convey nothing but the then existing interest of the delinquent tax-payer in the premises. And it was at the same time and in the same case decided that the only legal and valid proceeding for

the enforcement of a prior lien held by the Government upon the lands of a delinquent tax-payer, upon which other liens exist, is *"a suit in equity, to which, not only the distiller, but all persons having liens upon or interests in the premises, could be made parties,"* in conformity with the act of July 20, 1868 (above cited), now found in section 3207, Revised Statutes.

In that case the interest of the delinquent tax-payer in the land sold was a term of years; in the case at bar it was an equity of redemption, often of less value than a term of years. The outstanding interest in that case, which this court held did not pass under the distraint sale and fee-simple deed, arose under a deed-of-trust lien held by one Westover, created after the lien of the Government had actually attached to the property through the written waiver of the owner of the fee, duly recorded; in the case at bar the deed-of-trust lien of appellant was created after the tacit lien of the Government is alleged to have become attached by the mere fact of delinquency in the payment of taxes, but the appellant had not waived the priority of his lien except as to the three acres constituting the distillery premises. In the Mansfield case the collector seized and sold by the summary process of distraint provided in the act of July 13, 1866 (sec. 3197, Revised Statutes), and conveyed a fee-simple title to the purchaser, precisely as in the case at bar. The only defect in the analogy between the cases lies in the fact that, in the Mansfield case, the property was sold and conveyed to a private citizen, while, in the case at bar, in default of bidders, the property was sold and conveyed to the United States.

The decision in the Mansfield case is based on the essential principle that the permissive authority given by the act of 1868 to the Commissioner of Internal Revenue to file a bill for the foreclosure of internal-revenue liens, to which all other lienors shall be made parties, becomes *mandatory* upon him when the *interests of individuals become involved,* as in

that case and the case at bar. This court did not in its opinion in that case dwell upon or elaborate that well-known principle of statutory construction, for it had been well established by previous decisions of this court (*Supervisors v. The United States*, 4 Wall., 435; *Galena v. Amy*, 5 Wall., 705). The court, however, in its decision unequivocally affirmed and confirmed that proposition.

In the elaborate opinion then delivered Mr. Justice Harlan, after carefully collating and reviewing all the internal-revenue statutes bearing on the question and conceding that the Government held a prior lien on the fee-simple title to the land sold, used the following clear and unequivocal language:

> "The Government neglected to pursue the only mode by which the fee could be sold, namely, a suit in equity in which all persons interested in the property could have been made parties. When the distiller was in default in respect to taxes, it was for the proper officers of the Government *to elect* whether they would seek satisfaction of its demand by means of a seizure and sale by the collector of the *distiller's interest only*, or by a suit to which all persons having claims upon the premises on which the Government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the distiller could be seized and sold. That interest being only a leasehold interest, the purchaser at the collector's sale acquired nothing more."

Court of Claims Holds Contrary View.

(*b*) But the Court of Claims bases its adverse decision of the case at bar on a contrary view in respect to the doctrine thus affirmed. After reciting section 106 of the act of 1868, that court says:

"The language of the statute, 'may, if he deems it expedient,' direct a bill in chancery to be filed, does not of itself import a command, and, when taken with reference to the context of the whole act in which it appears, vests the

officer empowered by law to make the distraint with *discretion as to the expediency* of invoking the aid of this statute in enforcing the lien, as the circumstances of the case may require. It is clearly directory and does not repeal the act of July 13, 1866, respecting the mode of enforcement of a lien of the United States for delinquent internal-revenue taxes, as prescribed therein. The remedies given by the two sections of the different statutes are concurrent and not conclusive (*Alkan v. Bean,* 8 Bissell, 89)."

It may be here stated that the case of *Alkan v. Bean* (8 Bissell, 89), which is relied upon by the court below as authority for its conclusion, decided only *one point,* viz., that section 3224, Revised Statutes, is a valid enactment. It therefore held that injunction proceedings could not be maintained to restrain an internal-revenue collector in proceedings for the collection of a tax, regardless of the legality of its assessment. Incidentally the circuit judge for the eastern district of Wisconsin said (in October, 1877) that a proceeding in equity, previously commenced on behalf of the Government against other property of the distiller and still pending, did not preclude the collector from selling the distillery premises for tax on distilled spirits by distraint sale under the specific lien applicable to distillery taxes. It was in this connection that the circuit judge gave utterance to the *dictum* that the remedies by summary process and by bill in equity were concurrent. But it must be said, in behalf of this circuit judge, that this dictum was pronounced 13 years before the question of concurrency on the part of the remedies mentioned had been authoritatively decided by this court.

This case, so far from being an authority against appellant in the case at bar, tends strongly to confirm our contention (which will be developed later) that the lien for distillery taxes is, and has always been, confined to the distillery premises alone. The action of the collector in the Alkan and Bean case, in abandoning his proceeding against other property of the distiller, which was shown to be suffi-

cient, and falling back on his lien against the distillery premises, is strongly confirmatory of this view.

The Wording of Permissive Statute Not Material.

(*c*) It was contended by counsel for the Government in the court below that the original act of 1868, in question, used the words, "The Commissioner of Internal Revenue may, *if he deems it expedient,* direct that a bill in chancery," &c., and that the words "if he deems it expedient" were omitted by the revisers when that act was incorporated into the Revised Statutes as section 3207. It was suggested that had those words been retained in the Revised Statutes the decision of this court in the Mansfield case might have been different.

We make the same answer to this contention, in case it shall be renewed here, that we made in the court below. The words thus eliminated by the revisers were mere surplusage. The act was as clearly permissive or directory in its terms after the omission as before. There are a multitude of instances in the Revised Statutes where just such redundancies have been pruned out without in the slightest altering the intent of the statute. This court held in *McDonald v. Hovey* (110 U. S., 619) that such eliminations and corrections do not alter the meaning and intent of the original statute.

But the decision in *Mansfield v. Excelsior Co.* is not an isolated case. It is merely an affirmation of a principle well established in English and American law, to wit:

"Permissive words in respect to courts *or officers,* are *imperative* in those cases in which the public *or individuals have a right that the power so conferred be exercised*" (Lewis' Sutherland on Statutory Construction, 2d ed., sec. 636 *et seq.,* and numerous authorities cited).

In *Supervisors v. The United States* (4 Wall., 435) a statute directing that "the board of supervisors *may, if*

deemed advisable, levy a special tax," &c., was held, at the suit of an individual interested in the exercise of the power, to be mandatory on the board of supervisors. This court said:

"The conclusion to be deduced from the authorities is, that where power is given to public officers in the language of the act before us, or in equivalent language, whenever the public interest or *individual rights call for its exercise, the language used, though permissive in form, is in effect peremptory.* What they are empowered to do for a third person, the law requires shall be done. The power is given, *not for their benefit, but for his.* In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to *impose a positive and absolute duty.*"

This decision was again affirmed in *Galena v. Amy* (5 Wall., 705), where the language of the statute was as follows:

"The city council, *if they believe the public good and best interests of the city require it, may* levy an annual tax," &c.

It is manifest, therefore, that the wording of the permissive language in such statutes cuts little figure, and that the decision of this court in the Mansfield case, that the act of July 20, 1868, is mandatory upon the internal-revenue officers in cases where individual rights are involved, is a reaffirmance of a well-established principle of common law, and that it cannot now be shaken.

It follows as a necessary conclusion from the Mansfield decision that the taking over by the Government, through the Lawson deed,, of the fee-simple title of the Stephens land, and the long-continued adverse holding of the same against the mortgagee, the appellant, until his right of entry was barred by limitations, was the taking of private property without due process of law, regardless of whether the Government or the appellant held the prior lien.

II.

The Government never acquired any lien at all on the land in controversy, but only on the distillery premises; and, even if it had acquired such lien, it lost its priority to that of appellant through its long-continued negligence in not collecting its taxes monthly in conformity to its own mandatory laws, and in not enforcing its rights under the warehousing and official bonds of the distiller.

(*a*) The first branch of this proposition results from the facts already shown (*ante*, p. 9) that the tax on distilled spirits is alone involved in this case, and that in all the internal-revenue statutes a specific lien has been provided for this tax limited to the distillery premises alone. Therefore the general tacit lien upon all the property and rights of property of the delinquent, created by the act of 1866, upon which the claim of the Government rests, never had any application to the property here in controversy.

As has been shown, prior to the general revisory act of 1866, specific liens for each particular class of taxes, more or less comprehensive in character, had been provided. Up to that time, therefore, it could not have been seriously contended that any of the other specific liens had any application to distillery taxes. The consolidation by that act of all the other specific liens, excepting that for distillery taxes, into the general lien provided in section 1, hereinbefore recited (*ante*, p. 9), did not apply to distillery taxes, for the reason that in section 32 of the same act the specific lien for distillery taxes was again re-enacted and continued in force. By a familiar rule of construction, distillery taxes were thus excluded from the otherwise general consolidation.

But if the context of the act of 1866 had left any doubt

upon the question, that doubt appears to have been effectually removed by the essential amendments to the specific lien for distillery taxes in section 32 of the act of 1866, contained in the act of July 20, 1868, (cited *ante*, p. 10). These amendments essentially strengthened and re-enforced this specific lien and made minute and well-considered provisions to prevent this lien from conflicting with the rights of innocent third parties, like this appellant, who had acquired rights under the land registry system of the States. The distiller was required to obtain and file with the collector the written waiver of any lienor or owner of any outstanding interest of record in the distillery premises, or, in lieu thereof, to file a sufficient bond to indemnify the Government against such claim, and to make it a condition of his distillery bond that he would not thereafter encumber the distillery premises by mortgage, judgment or otherwise. And these amendments are still the law (secs. 3251, 3260-3262, Revised Statutes).

It is not reasonable to suppose that if Congress had regarded the comprehensive lien of 1866 (which, as we have seen, is by its very terms paramount to the liens and other interests acquired under the land registry system of the States, and overreaches them by retroaction upon the happening of a mere private incident like the accrual or demand of a tax) to be applicable to these distillery taxes, they would have so carefully guarded against a possible conflict with the registry laws.

It is to be observed that the spirit tax lien is and has always been essentially different from the general lien of 1866, in that it takes effect, not *"after demand"* or upon any other contingency, but, *ipso facto*, upon the spirits coming into existence. In its very nature there is nothing retroactive about this lien.

How far Congress in maintaining this specific lien in 1866, and perfecting it in 1868, may have been influenced by a doubt as to the validity of the extraordinary power first asserted in the comprehensive lien of 1866 will not

be here considered. It has been shown that the abundant provisions contained in the distillery regulations, requiring the distilled spirits to remain in the custody of a Government official from the time of their creation until the tax was paid, and that a sufficient warehousing bond in double the amount of the tax, conditioned for its payment, be regularly executed by the distiller as the spirits were produced, rendered the specific lien thus provided completely adequate and no other provision in that behalf necessary or proper.

(*b*) But supposing, for the sake of the argument, that the contention of the Government that the general lien of 1866 was applicable to these distillery taxes, still it would be unconscionable and in conflict with all the analogies of law that the Government should maintain it in the case at bar, in derogation of the prior lien of an innocent claimant, after having for a period of more than four years neglected to enforce its own adequate and mandatory laws for the monthly collection of these distillery taxes and its remedies under the warehousing bonds.

This general lien of 1866 was construed by Mr. Justice Miller, of this court, in the Missouri circuit, in 1877, in the case of *The United States v. The Pacific Railroad* (4 Dillon, 71). That was a bill in equity to enforce the lien against the Pacific Railroad Co. for non-payment of the internal-revenue tax upon its gross receipts, which was filed in conformity with the amendment of 1868 heretofore cited (*ante*, p. 10). (It may be here said in parentheses that this is the class of cases in which this lien is usually invoked.) The defendant demurred to the bill on the ground that it did not set forth a specific demand of the exact amount of tax due. It was shown on the part of the Government that repeated demands in writing and otherwise had been made upon the defendant railroad company to make the return of its gross receipts required by law, without which the amount of the tax could not be ascertained; and that the

defendant had persistently refused, alleging its purpose to make legal defense. But Justice Miller sustained the demurrer on the ground that the enforcement of so harsh and extraordinary a lien was *strictissimi juris*, and that every step required by law for the assessment and collection of the taxes must have been taken before the lien could be enforced. He said:

"It is argued by the district attorney, with some degree of force, that, since the return which was demanded was an essential and necessary foundation on which the Government could ascertain the amount of taxes and make a demand for them, and since they (the defendant company) have refused peremptorily to do that, accompanied with the statement that they were prepared to defend—that they would not make any return but defend against them—it is said that any further demand is not required; that it was practically a demand and a refusal; and there is some force in the argument. * * * It is to be observed that the statutes bristle all over with the weapons which are supposed to be efficient to enable the Government, not only to ascertain what amount of taxes are due from any person or corporation, but *to collect those taxes.* * * *

"There is further to be considered *the extraordinary nature of the lien.* It is not only a lien upon land but upon personal property. It is not only a lien upon property in possession, but upon all rights of property depending upon contracts and upon unexecuted contracts. It not only creates a present lien, but it relates back. * * * *Now when the lien, as created by the demand, is of such a character,* it is reasonable and it is proper that *all the steps which the law requires of the party creating the lien in his own favor shall be pursued strictly.*"

This decision was accepted by the Government; no appeal was taken, and it is now the accepted law. In fact it is quoted approvingly upon another point by the court below in the case at bar (Record, p. 16). Numerous authorities might be cited upon the point of negligence as affecting priorities, but this will suffice. Applying the principle of that decision to the case at bar, and the position of the Govern-

ment in respect to negligence will be found to compare very unfavorably with its attitude in the Pacific Railroad case.

Appellant an Innocent Party.

From the aforegoing considerations the position of the claimant and appellant clearly appears as that of an entirely innocent party. When, on January 25, 1870, he waived the priority of his lien on the three acres constituting the distillery premises, in conformity with the act of 1868, as shown by Finding X (Record, p. 14), he rightfully assumed that he had done all that the federal laws required of him, and that his priority on the remainder of the farm was secure. He had a right to assume that the priority of lien required by the Government in respect to distillery taxes was limited by law to the distillery premises alone.

But even although the contention now made on behalf of the Government, that the general lien of 1866 was also applicable, were true, still *the claimant, with a full knowledge of the law, had a right to assume when he took his mortgage, on October 26, 1869, that the Government had been collecting its taxes monthly in compliance with its own mandatory laws,* already cited, and, therefore, that the payment of the tax could not be *more than one month in arrears.* By all the analogies of law the Government would be estopped in any proceeding for the enforcement of its lien from disputing that presumption.

The Lien on Distillery Premises Adequate.

Notwithstanding its four years of negligence in the collection of the tax by distraint upon the whiskey out of which it arose, which was all the time in the custody of its own officer, still when the Government did finally, in December, 1870, distrain the distillery premises and contents, upon which the specific lien rested, *it levied upon property amply*

sufficient to satisfy all the arrears of taxes. This fact was clearly shown by the evidence and is found to be a fact by the Court of Claims in Finding VI (Record, p. 10) in the following words:

"Pending said advertisement and prior to the sale, the distillery buildings and their contents, including a quantity of whiskey, were destroyed by fire, and, *in consequence thereof,* and before the day set for the sale, the said collector extended his distraint so as to include the remainder of the said Stephens land, amounting in all to about 525 acres, which included the land included by the said Smith, Ellett & Co. deed of trust, and advertised all of said land for sale."

The invasion of the rights of appellant, through the invocation of a new and different lien, is thus found to have been *in consequence of a fire,* which took place while the distillery property was in the possession of the Government under the process of distraint.

It is respectfully submitted that, instead of thus invading the rights of this innocent party, the Government was legally bound to have put in suit the warehousing bonds, which, as we have seen (*ante,* p. 12), were in double the amount of the tax and, therefore, ample security. But the above-quoted finding of fact precludes the possibility of any steps at all having been taken in that direction, for it is shown that the collector, immediately after the fire, extended his distraint so as to include appellant's property, and "on the 12th day of January, 1871, offered all of said Stephens' land for sale at public auction." Thus within *one month* from the time of the first levy upon the distillery premises and within *a few weeks after the fire* the appellant's property is finally sold and struck off to the Government. Nor is there any allegation at all that the warehousing bonds were insufficient.

Congress Gives Priority to Appellant.

A reference to the jurisdictional act (Record, p. 6) apparently shows that Congress had considered the several points set forth in this branch of our argument, and had itself determined the priority of appellant's lien, for it is therein distinctly stated that Smith, Ellett & Co. "had a prior lien" on the land in controversy. It appears, therefore, that the question of the priority of appellant's lien was not submitted to the Court of Claims, since it was clearly within the power of Congress to determine that question for itself.

III.

The Lawson deed, as set forth in Finding VII (Record, p. 11), would not have been a valid conveyance of the property before the passage of the act of July 20, 1868, directing a proceeding in equity, because of its failure to set forth in its recitals the essential fact of a demand of the tax prior to October 26, 1869, when appellant's lien attached; and this fatal omission cannot be cured by any presumption that the officer discharged his duty.

The act of July 13, 1866 (14 Stats., p. 109), prescribing the form and effect of deeds of internal-revenue collectors in pursuance of distraint sales of land, as literally embodied in section 3199, Revised Statutes, provides as follows:

"The deed of sale given in pursuance of the preceding section shall be *prima facie* evidence of the facts therein stated; and if the proceedings of the officer *as set forth* have been substantially in accordance with the provisions of law, shall be considered and operate as a conveyance of all the right, title and interest the party delinquent had in and to the real estate thus sold at the time the lien of the United States attached thereto."

Mr. Justice Miller, in passing upon the general lien of 1866 in the case (already referred to) of *The United States v. The Pacific Railroad* (4 Dillon, 21), said:

"Here the act that constitutes and creates the lien is the demand. Without the demand there can be no lien, but *with a just and proper demand, made in a proper way, the officer creates the lien by the very act of making the demand."*

In that case, although the bill in equity filed by the Government to enforce its lien alleged *three different* DEMANDS, Judge Miller held that they were not set forth with sufficient particularity and dismissed the bill on demurrer.

This same statute was further construed in the same court three years later (in 1880) by Judge McCrary, in another case between the same parties (1 McCrary, 1; 1 Fed. Rep., 97), in which, following up the decision of Judge Miller, above cited, he held that the demand when made (which was satisfactorily proven in that case) created a lien *upon such property only as belonged to the delinquent tax-payer at the time of demand.* He said:

"But if upon making demand now after twelve or fifteen years from the time when the taxes were due the Government can establish a lien upon all the property then owned by the delinquent tax-payer, it would result that in most cases not the guilty, *but the innocent, would be made to suffer.* Such a doctrine would also unsettle the titles to real estate."

The Court of Claims recognizes the authority of this case and cites it approvingly in its opinion. Accordingly it finds as a fact (Finding VI) that demand was made prior to October 26, 1869, the date of appellant's mortgage; but in its opinion it discloses that it bases this finding upon *the presumption* that the officer discharged his duty in accordance with the law, which requires him to make monthly demand of distillery taxes. But in Finding VII, at the request of appellant, it sets forth *in extenso* the Lawson deed, *the recitals whereof* have been made by the statute above quoted

the only legal evidence by which such demand can be proven. Hence, reading the two findings together, it is clearly shown that the fact of demand has not been established.

What does the Lawson deed say? This is the recital on the point in question:

"And whereas the United States of America being duly declared the highest bidder, they having offered the sum of $4,239.50, the highest bid made, such amount so offered according to the terms of sale, to *include and cover* all taxes and accrued penalties on account of non-payment of taxes due from July A. D. 1867, to August A. D. 1869, denominated 'delinquent taxes' and to also include all interest and expenses of sale in this behalf."

It will be seen that this recital *makes no mention at all of any demand of any amount having been made at any time of any person whomsoever.* It also fails to recite clearly that the taxes, for which the sale was made, accrued prior to October 26, 1869. If the amount for which the sale was made had been made up entirely of taxes which accrued between the dates mentioned, it could not be said that such amount *"included and covered"* those taxes, since it cannot logically be predicated of anything that it "included and covered" itself.

It is manifest, therefore, that the recitals in Lawson's deed do not show that his proceedings were "substantially in compliance with the provisions of law," as required by the act of July 13, 1866, and this deed therefore could not be held sufficient to have carried out the tacit lien in question at any time since it was created.

If a bill in equity will be dismissed on demurrer for failure to set forth with certainty a demand of the taxes, the recitals in the above deed certainly fail to show that the proceedings of the officer have been substantially in accordance with the provisions of law.

No Presumption in Favor of a Tax Collector.

But the court below holds that these patent defects on the face of the deed are cured by a legal presumption that a public officer discharges his duty according to law. It says:

"The recitals in the deed, which by the statute creating the lien are made *prima facie* evidence of the facts contained therein, warrant the court in holding that the statute was fully complied with until the contrary is made to appear. We are not to presume that a public officer, charged with the performance of a particular duty, discharges the same contrary to the statute. *The contrary presumption obtains, and the duty of overturning it rests upon the party alleging a failure in this particular.* Therefore we conclude that in so far as time is concerned the lien of the defendants attached to the property belonging to said Stephens prior to the lien of claimant created by the trust deed of 1869."

While it is conceded that there is a general presumption in favor of the proper discharge of his duty by a public officer, there is a recognized exception in cases where the law has required the officer to make a record of his proceedings.

Am. & Eng. Encyc. Law, vol. 22, p. 1270.
Pearsall *v.* Eaton Co., 71 Mich., 438.

And it is a well-established and generally recognized principle that an *officer making a tax sale of land* not only has no presumption in favor of the regularity of his proceedings, but that the *onus of proof* is on him and those claiming under the title he passes to *affirmatively establish the regularity of his proceedings.* Hence the general practice of requiring the tax collector to make a record of his proceedings.

Early *v.* Doe, 16 Howard, 618.
Rokendorff *v.* Taylor, 4 Peters, 349.
Parker *v.* Rule's Lessee, 9 Cranch, 64.
United States *v.* Pacific R. R., 1 Fed Rep., 97.

The doctrine of this court upon the point in question is succinctly stated by Mr. Justice Swayne in Early *v.* Doe, above cited. He said:

"This court said in *Williams v. Peyton* (4 Wheaton, 77) that the authority given to a collector to sell land for the non-payment of taxes 'is a naked power, not coupled with an interest.' In all such cases the law requires every prerequisite to the exercise of the power must precede its exercise. Again in Rokendorff's case (4 Peters, 349) this court repeated that in *ex parte* proceedings, such as a sale of land for taxes under a special authority, *great strictness is required.* An individual cannot be divested of his property against his consent until every substantial requisite of the law has been complied with. *The proof of the regularity of the collector's proceedings devolves upon the person who claims under the collector's sale.*"

6 Allen 576

And the facts required to be recited in a collector's deed cannot be proven *aliunde.* In *Harrington v. City of Worcester* (~~above cited~~) Judge Metcalf, in delivering the opinion of the Supreme Court of Massachusetts, said:

"In this case the collector's deed to the tenants, although it states a demand of the tax made on the person taxed, does not state that payment was not made within fourteen days. This is not a statement of a legal 'cause of sale,' and the question therefore is whether this defect in the deed prevents the tenants from acquiring a title under it. And the court are of opinion that it does; that the provision that the deed 'shall state the cause of sale' is not merely directory, but is a *condition precedent to the operation of the deed.* If the legal cause of sale may be omitted in the deed, and *the defect be supplied by proof aliunde, or by admission,* so may any of the other matters which the statute requires the deed shall state."

The above decision rests on the fundamental principle of the law of evidence that facts, of which record proof is required by statute, must be so proven.

By reference to federal statute regulating the internal-revenue collector's deed of land sold at tax sale (cited *ante,*

p. 26), it will be seen that it, in clear language, makes the validity of such conveyance to depend *as a condition precedent* upon the proceedings of the officer *as set forth* in the recitals of the deed being according to law.

A Self-rebutting Presumption.

As already shown, the court below bases its presumption that the officer made the necesary demand upon the statute requirement that "if said tax shall not be paid before the end of the month, as aforesaid, it shall be the duty of said collector to demand payment thereof with ten per centum additional;" but in so doing it ignores the fact that in the same clause of the same statute it is made the duty of the collector *"if said taxes are not paid within ten days after such demand to make distaint therefor as provided by law."*

Thus the court presumes that the first clause of the statute was complied with, while the very standing of the Government in court rests solely upon a non-compliance with the latter clause requiring the collection of the tax by distraint! It is further to be observed that the *demand* contemplated by the decision in the Pacific Railroad case as giving vitality to this lien is not a mere naked verbal demand, not followed up by any further proceeding, such as the court below *presumes* to have been made, but a demand *followed up in ten days by public proceedings* to enforce the lien and collect the tax, such as the statute provides. The reason of the rule announced by the court is addressed solely to the protection of *innocent persons* dealing with the property. This mere naked demand would be a fact known only to the parties making and receiving the demand, and could be no possible protection to innocent parties.

The obvious fact of the matter is that from the first commencement of Stephens' arrearage through all the unwarranted indulgences they granted to him the internal-revenue officers had been relying for their security upon the taxed

liquor itself, which was in their own custody, and upon the special lien on the distillery premises, which did not require any demand to give it vitality, but attached itself to the liquor and the distillery premises the moment the liquor came into existence. It was only after the accidental fire, which destroyed their legitimate security, that they thought of invoking the general lien against the mortgaged land of Stephens to repair the loss.

It follows, therefore, that the acceptance by the Government of the title to this land, under a deed thus patently defective, and the long-continued holding, as shown by the record, was in violation of law.

IV.

The taking by the United States of the vested property of the appellant in the Stephens land, through the unwarranted process shown by the record, and the long-continued adverse holding thereof under the false title thus created and made of record, and the immunity from suit attendant upon their sovereignty, render the defendants liable to appellant in this proceeding for just compensation and full indemnity, including interest.

The liability of the Government is *res adjudicata* by this court in the Mansfield case. Here the Government took the property by the identical process that was declared absolutely null and void in that case. It was there decided that a private party purchasing property from an agent of the Government, in the same manner that the Government purchased this property from its own agent, took absolutely nothing, and forfeited the money he paid to the United States as a consideration of such conveyance. The judgment in ejectment was affirmed against him, which necessarily laid him liable to the plaintiff for use and occupa-

tion, after the expiration of the distiller's term, and for any damage to the property that occurred during his occupancy.

By the same measure of justice, the extent of the Government's liability in the case at bar would be the restoration of the property, in the same condition as when taken, with damages for use and occupation since January 12, 1871, when the property was struck off by its officer. But the Government having incapacitated itself from restoring the property by holding it adversely for more than fifteen years, until the lien of appellant was barred by the Virginia law limiting re-entry upon real estate, and then conveying it to a third party freed from such lien, the only practical measure of its liability now would be the face value of appellant's lien (if the property equaled or exceeded the lien in value) and interest thereon at six per centum (the legal rate in Virginia) added for use and occupation, which is the usual measure of damage in that behalf.

Question of Interest.

The act of March 3, 1863 (sec. 1091, Revised Statutes), provides that no interest shall be allowed in ordinary judgments upon contracts against the Government unless expressly stipulated, and the decisions of this court have generally sustained the principle there declared. However, there have been cases in which Congress and the courts have allowed interest. Attorney General Cushing, in an exhaustive opinion (7 Opinions Att'ys Gen., 531), reviewing the exception to the rule, says:

"There is another possible case of apparent, but not real exception, and that is 'damages' provided by statute to be assessed against the Government. In one of the general acts above cited, a statutory interest on the detention of money is the established rendering of the term damages (1 St. L., 85). If, therefore, any such case of claim on the Government can be shown, with color of demand for interest as damages, it will be no departure from the rule never to allow interest except on express requirement of statute."

The case at bar is exceptional in respect to allowance of interest in two essential particulars:

1. In that it involves a constitutional obligation for the deprivation of a person of his private property without due process of law, the remedy for which has been fixed by the Constitution itself as *"just compensation."*

2. In that the jurisdictional act has in express terms made the Government liable for the *"occupation"* of the property, and the only measure of damage for occupation is interest on the value of the property occupied.

The Secretary of the Treasury, in an official communication in response to the request of Assistant Attorney General, which appears among the evidence on page 32, etc., of the printed record in the court below, states that the property was leased to Stephens upon annual rent during the Government's occupation, and that the property was "subject to pillage, the good timber being cut off" during the same period. Appellant requested the court below to embrace this official communication in its findings of fact, but the court failed to do so, but for the information of this court the claimant has set forth this official communication in an appendix at the end of this brief. The omission may have been due to section 4 of the act of March 2, 1867 (sec. 3208, Revised Statutes), which provides that the "Commissioner of Internal Revenue shall have charge of all real estate assigned, set off, or conveyed, by purchaser or otherwise, in payment of debts arising under laws relating to internal revenue." This statute, in connection with deed in fee from Lawson to the United States, set forth in Finding VII, and the deed in fee from the Commissioner of Internal Revenue to the Stephens heirs, set forth in Finding VIII, afford sufficient proof of the occupation of the defendants.

Appellant Barred by Adverse Occupation.

The occupation of the defendants for more than fifteen years adversely to and in express conflict with claimant and appellant, as shown by Finding VI (Record, pp. 10, 11) and the Lawson deed (Finding VIII), finally barred and annulled the lien of claimant. The Virginia Code of 1849, chapter 149, section 1, which was then in force, provides as follows:

"No person shall make an entry on, or bring any action to recover, any land lying east of the Alleghany mountains, but within fifteen years; or any land lying west of the Alleghany mountains, but within ten years, next after the time at which the right to make such entry, or bring such action, shall have first accrued to himself, or some other person through whom he claims."

Greene county lies east of the Alleghanies, and the same limitation is still in force in Virginia.

Appellant Without Remedy.

Congress having, with a presumably full knowledge of all the facts of the case, removed the bar of limitations and conferred special jurisdiction on the Court of Claims to hear and determine the case, the question of whether or not the appellant diligently pursued such remedies as were available to him is not properly before the court. Any negligence in that behalf, however, if any can be shown, might unfavorably influence this court in the allowance of interest.

The court below, in its opinion (Record, p. 18), suggests that appellant might have redeemed the property by paying the amount claimed by the Government with 20 per centum added. This remedy is provided by the statute for a *second* lienor *in those cases in which the collector has a right to sell by distraint.* Surely not for a lienor having priority

to the Government, and in a case where this court has held the collector cannot sell by distraint. Besides, the value of the property is not shown by the findings to have been in excess of the mortgage, and in point of fact was little, if any, in excess thereof.

In fact and in law, the claimant was absolutely without remedy after Lawson seized the property outside of the distillery premises under distraint. In order to give actual, as well as constructive, notice of his lien claimant appeared on the day of sale and publicly gave notice of his lien, which Lawson wholly disregarded and proceeded to sell the property, as he recites in his deed, *"as the property of George J. Stephens,"* and inserted an unusual clause of *special warranty* in his deed. Thereafter there was nothing left for appellant to sell in a foreclosure proceeding but a *lawsuit against the Government,* and this, of course, nobody would buy. If claimant had incurred the useless expense of making a foreclosure sale merely to bid in this lawsuit against the Government, he would have then stood in no better situation than in his capacity of lienor. The fifteen years of adverse possession by the Government would have barred him out just the same.

If the deputy collector had sold and conveyed the property to a private person or corporation, claimant's obvious remedy would have been to file a bill in an equity court to annul and cancel the deed and restore the marketable value of the property as a preliminary to the foreclosure of his mortgage. But the property having been sold and conveyed to the United States, claimant was absolutely without remedy.

This court held in *The United States v. Eckford* (6 Wall., 484) that the judiciary act does not authorize a suit against the Government; and that parties aggrieved by the course pursued by the executive officers of the Government "have *no other remedy than by petition to Congress,* except in the limited class of cases cognizable by the Court of Claims."

In *Gibbons v. The United States* (8 Wall., 275) this court, while conceding that Congress can and ought to provide a remedy for those acts of executive officers "which, *though unauthorized, may have been done in its interest and of which it may have received the benefit,*" held, however, that, in such cases, where it is proper for the nation to furnish a remedy, *Congress has wisely reserved the matter for its own determination. It certainly has not conferred it on the Court of Claims.*"

See also—

Reeside *v.* Walker, 11 Howard, 290.
Carr *v.* The United States, 98 U. S., 433.

The measure of damage in such a deprivation of property as is here involved having been fixed by the Constitution itself as "just compensation," it was not in the power of Congress, in the act of 1863, above cited, or in any other act, to diminish the measure thus fixed.

We respectfully submit, therefore, that the appellant is entitled to judgment for $8,666.44, the principal of his lien, and interest thereon from January 12, 1871, the date of the taking complained of.

The Court of Claims has not, in its findings, fixed the value of the land taken, but sufficient and satisfactory evidence thereof is found in the record of the court below, which, as already pointed out (*ante*, p. 3), establishes the same to be between $8,000, the amount requested to be found by the Government's counsel, and $10,500, requested by counsel for appellant.

In remanding the case this court may direct the court below, after fixing the value, to enter judgment as above indicated, unless the value of the property should be less than the principal of the mortgage, in which event the value of the property shall constitute the principal sum of the judgment.

Appellant's Right to Maintain the Suit.

Finding IV of the Court of Claims refers to an *equitable* assignment of the claim in controversy to William F. Larrabee, who had in the meantime become a member of the firm, and Finding V sets forth *in extenso* an agreement under seal, dated November 17, 1903, between Blacklock, the appellant, and John T. Morris, surviving executor of Larrabee, now deceased, reciting and ratifying a former agreement between Edward Otis Hinkley, a deceased coexecutor, and Rinaldo P. Smith, whereby Smith was authorized and empowered to represent Larrabee's interest in prosecuting the claim, and the division of the proceeds was stipulated. This agreement expressly confirms the authority of Rinaldo P. Smith in bringing the suit and of Blacklock, the appellant, in maintaining it, and stipulates that the Larrabee estate shall be fully concluded by this proceeding and the judgment herein. The agreement has been duly approved by, and is of record in, the Orphans' Court of Baltimore city, and is, therefore, binding on both Smith's and Larrabee's estates.

Although this feature of the case is ignored by the lower court in its conclusions of law, as set forth in its opinion, yet, being retained in the findings, some effort may be made in this court, on that ground, to question the right of appellant to recover.

To this contention, in case it should be made, there are several valid and conclusive answers:

1. The facts found by the Court of Claims show conclusively that the interest of Ellett was merged in Larrabee by assignment "for full and valuable consideration," and that the representatives of both Larrabee and Smith are concluded by this proceeding. The fundamental principle underlying the rules of pleading in relation to the perfection of the record in respect to parties is to the end that *all*

parties in interest shall be concluded by the judgment. That principle is fully sustained in the case at bar, and no question can now be raised in respect to parties.

2. Larrabee's surviving executor fully confirms, in the agreement recited, the original authority given by his deceased coexecutor to Smith to begin the suit; but, aside from this, it was entirely competent for the surviving executor to ratify the bringing and maintenance of the suit after it was commenced and while it was pending (*Moore v. Spigel,* 143 Mass., 413).

3. The jurisdictional act in this case does not leave open the question of Smith's right to maintain the suit, but expressly and positively affirms that "the late firm of Smith, Ellett & Co., *now represented by Rinaldo P. Smith,* had a prior lien," &c. So it is manifest that Congress had satisfied itself of Smith's right to maintain the suit, and that question was not submitted to the Court of Claims.

4. Larrabee's name could not be used in the prosecution of the suit, because he was only an *equitable* assignee.

Not Analogous to Cumming's Case.

Before concluding, it may not be improper, out of abundance of caution, to point out that there is no possible analogy between the case at bar and that presented in the case of *The United States v. Cumming* (130 U. S., 452), in which this court held that the unauthorized act of an internal-revenue collector, *in no way ratified by the Government,* did not render the Government liable for damages, under the *ordinary jurisdiction* of the Court of Claims. The decision turned upon the wording of the jurisdictional act, which provided that the claimants "be permitted to sue in the Court of Claims, which court shall pass upon the law and

the facts *as to the liability of the United States* for the acts of its officer."

Mr. Justice Harlan, in delivering the opinion of a majority of the court, said:

"If the facts disclosed a case of *unauthorized wrongs* done to the plaintiffs by the revenue officers, the question, *by the very terms of the act*, would still remain whether the United States were liable in law."

The learned justice clearly intimated that, but for the question the jurisdictional act itself raised as to the Government's liability for the tortious actions of its officers, the majority might have arrived at a different conclusion. This court had previously held, unanimously, in *Gibbons v. The United States* (8 Wall., 275), that the Court of Claims could not take cognizance of such cases of tortious acts by federal officers under its *ordinary jurisdiction;* but, in the same opinion, it was distinctly enunciated that it was the right and the duty of Congress, by a special jurisdictional act, to invest that court with such jurisdiction in meritorious cases.

The case at bar clearly differentiates itself from the Cumming case in three essential particulars:

1. The jurisdictional act could not have been more carefully drawn to avoid the objection of the court in the Cumming case. It expressly sets forth as the subject of adjudication, "the sale, purchase, or occupation *by the Government*, through its internal-revenue officers, or others," of the real estate upon which claimant "had a prior lien," and says that "*jurisdiction* to hear and determine the case *'is hereby conferred.'*"

2. The damage to claimant resulted wholly from the ratification of the action of its officer by the Government and the long-continued holding of the property, whereby the claimant was barred out. Had the property been sold

to a private person, claimant might have had the deed canceled by legal proceedings and cleared his title.

3. The action of Deputy Collector Lawson was not of a tortious character. His official duty required him to use his best judgment in the execution of the laws regulating his proceedings in collecting the taxes, and he so exercised his judgment as to meet the approval of the honorable Court of Claims. He did nothing, therefore, for which he could have been personally held liable.

It is respectfully submitted, therefore, that the judgment of the Court of Claims ought to be reversed and the cause remanded, with direction to the court below to enter judgment in favor of the appellant and claimant, as hereinbefore set forth.

FRANCIS M. COX,
CHARLES C. LANCASTER,
JOHN M. THURSTON,
Counsel for Appellant.

APPENDIX.

The following official letters appear on pages 29-33 of the printed record of the Court of Claims in the pending case. Claimant requested that these letters or the substance of them be included in the findings of the court, but the request was not granted.

TREASURY DEPARTMENT,
WASHINGTON, *March* 2, 1904.

The Honorable the Secretary of the Treasury.

SIR: I have the honor to make the following report in the matter of the suit, No. 22911, now pending in the Court of Claims, Rinaldo P. Smith *v.* The United States:

The records of this office show that the lands of George J. Stephens, in the 6th collection district of Virginia, were distrained and sold January 12, 1871, to enforce collection of taxes, penalty, and interest due from Stephens. A minimum price was fixed by the collector, and no bid of that amount having been received the lands were declared sold to the United States for $4,239.50, and deed was made by the collector, which was recorded in the land records of Greene county, Virginia, on January 22, 1872.

For a number of years after this transaction George J. Stephens and his family were allowed to remain in possession of the lands without paying rent therefor, but in the year 1883 he was required to pay $100 per annum rent, and continued paying at that rate until the year 1888 (though the payments were often in arrears and collected with difficulty by installments), when the United States sold the property to a relative, Miss Willie G. Stephens, for the sum of five hundred dollars ($500), and quitclaim deed was made.

I am requested to report as to the causes leading to the sale at the low price of $500. On this point see copy of letter of Commissioner Miller, dated May 20, 1888, quoting from a report by Collector Shepperd as to the bad condition

of the land; that the property was subject to pillage, the good timber having been cut off. It is the general policy of this office to dispose of realty so acquired at the earliest practicable day. That it was not done in this case appears to have been due to the fact that no one would bid on it.

In regard to the price of $4,239.50 for which the lands were declared sold to the United States, the records of this office do not show what items of indebtedness with interest and penalty thereon made up this amount, and therefore it cannot be determined from the records whether the amount included only the taxes which had accrued up to October 28, 1869.

Respectfully, JOHN W. YERKES,
Commissioner.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, *May* 20, 1888.

The Honorable the Secretary of the Treasury.

SIR: Collector H. Shepperd, of the sixth district of Virginia, reports that Dr. J. G. Stephens has informed him that he will bid $500 for the interest of the United States in the realty in Greene county, Va., formerly owned and still occupied by his father, George J. Stephens, when the same shall be exposed for sale at a public vendue, and as evidence of good faith he has already placed $390 of said amount in the hands of the collector. Collector Shepperd in letter of the 16th ultimo expresses himself thus:

"After a careful consideration of the matter, I would respectfully recommend that this offer be favorably considered, and the land offered for sale upon the basis of said bid. I inclose herewith a letter received by me from my deputy, T. M. Dunn, in whose division this land is, and who is intimately acquainted with it, and in whose judgment I have great confidence. From what he says, and from my knowledge of the character of the land, I do not think the land will bring much if any more than the offer made by this party."

This is what Deputy Collector Dunn says in his report to Collector Shepperd, dated April 13, 1888:

"The property is in very bad condition; no attention has been given it since it passed into the hands of the Government.

The land lies on a ridge, and is very poor indeed, washes and gullies all over it, which makes it almost valueless for farming purposes. The timber is not worth anything scarcely, consisting mainly of second-growth oak, and old-field pine. The property is subject to pillage all the time, with no one to watch over it, and decreasing in value constantly. My opinion is that the land ought to be sold. I believe it will bring as much now as it ever will. No one seems to care for it, or wants anything to do with it, except the Stephens family, who have no other home and are as poor as they can well be. I am confident the property cannot be rented for any sum worth mentioning."

* * * * * * *

(Signed) JOS. S. MILLER,
Commissioner.

Office Supreme Court, U. S.
FILED.
DEC 9 1907
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 65.

FRANK BLACKLOCK, EXECUTOR, APPELLANT,

vs.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

FRANCIS M. COX,
CHARLES C. LANCASTER,
JOHN M. THURSTON,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

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FRANK BLACKLOCK, EXECUTOR, APPELLANT,

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THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

REPLY BRIEF FOR APPELLANT.

The brief filed herein on behalf of the United States is so remarkable in some of its propositions as to call for a few words in reply.

In this brief counsel injects as preliminaries two propositions quite foreign to the real merits of the case, as shown by the conclusions of law of the court below as they appear in the record.

The Government's defenses are thus set forth under three propositions, as follows:

"1. No damage or loss is shown to have been sustained by *any one* by reason of the Government's action in the premises.

2. The appellant has sustained no damage or loss by reason of the Government's action.

3. The action of the Government in no wise illegally or wrongfully invaded or prejudiced the rights of the holder of the Stephens debt."

It thus appears that the Government reserves the defense of the opinion and judgment of the Court of Claims, which is alone in controversy, to its third proposition, but we shall in reply follow the threefold character of its contentions and say a word in reply to each in their order.

I.

The proposition that "no damage or loss is shown to have been sustained by *any one*" is predicated on the simple fact that, although Finding IV (Record, p. 9) shows that the Stephens debt remained intact at $8,660.44 in 1873 or 1874, several years after the property was taken by the Government, yet, as stated by counsel, "beyond that it is not traced and it does *not* appear that it was *never* paid by said Stephens."

When claimant establishes the fact of a mortgage indebtedness unpaid at maturity and remaining unpaid for several years, he establishes a *prima facie* case, all burdens then shift, and if the Government claims that the mortgage was subsequently satisfied and discharged, it is for the Government to establish such contention.

The insolvency of the personal estate of George J. Stephens is one of the fundamental facts of this case, upon which the Government's whole case rests, since the power to sell land for internal-revenue taxes is made by the Federal statutes to depend absolutely upon a failure of personal assets (act of July 13, 1866, ch. 184, section 9, 14 Stats., 108).

Besides, the court below had before it the fullest proof of the continued existence of the debt, as the junior counsel of appellee is well aware. This proof consisted, first, of the original specialty papers by which the debt was secured—a sealed note and a mortgage—filed by Rinaldo P. Smith with his petition, upon which no endorsements of any payments appear, copies of which originals are set forth *in extenso* in Finding III (Record, p. 7); second, of the concurrent testimony of J. H. Smith, the confidential book-keeper of the

firm; John Hinckley, secretary of the American Bar Association, former counsel; John T. Morris, his law partner, the surviving executor of the Larrabee estate, and Francis M. Ellett, the Government's own witness, that no part of the debt was ever paid; and, lastly, the tacit admissions on the records of Greene county, Virginia, of the Stephens heirs themselves in the bill of injunction filed in the court of that county in 1889, in which they sought, solely on technical grounds, to restrain the sale of the property by Rinaldo P. Smith. This bill of complaint appears in full in the proofs before the court below (p. 59) and is referred to in Finding IX of the Court of Claims.

With this full proof before them, the Court of Claims finds the extent of the indebtedness in 1873 or 1874, several years after the Government took possession, and this status, of course, is presumed to continue, in the absence of any suggestion to the contrary. There is therefore no possible ambiguity on this score in the findings of the Court of Claims.

Reference is here made to the evidence not for the purpose of contradicting the findings of the Court of Claims, but for the purpose of showing, what undoubtedly must be presumed, that the court below had sufficient evidence before it to substantiate its findings, which in effect are that this mortgage indebtedness has never been paid or satisfied.

The finding of the court below of an outstanding indebtedness not paid at a certain date, and the failure of the court to in any manner consider in its opinion or decision the suggestion that this indebtedness may have been subsequently satisfied, makes it conclusively appear that no such question is in this case or can now be injected here.

II.

The Government's second proposition, that "the appellant has sustained no damage or loss by reason of the Government's action," has reference to a mutual arrangement as to

a transfer of interests among the members of the firm owning the claim against the Government. This point, though raised in the court below, was entirely ignored by that court in its conclusions of law as transmitted to this court, and there is serious doubt as to whether it is open to consideration here, since this court does not hear the case *de novo*, but only on review of the opinion and judgment of the court below. However, lest this question might be raised and be deemed open to consideration, we have already discussed the point in our original brief at page 38, and there is little, if anything, more we deem it necessary to say now.

From all the proceedings it appears that it was the firm of Smith, Ellett & Co., consisting of Rinaldo P. Smith and Francis M. Ellett, to whom Stephens was indebted and who sustained the wrong at the hands of the Government. This firm was not dissolved until January 1, 1875, when it finally expired and closed up its business, but, as appears by Finding II (Record, p. 7), about January 1, 1870, "its *personnel* was changed by admitting therein as a full partner William F. Larrabee;" and the same finding discloses that when said partnership expired, in 1875, Rinaldo P. Smith was the settling partner. The Stephens debt was of course still carried along as an asset of the firm after the accession of the new partner, but it continued to be an asset of Smith, Ellett & Co. This is shown in Finding VI (Record, p. 10) to have been the case January 12, 1871, for on that date it is found that "Rinaldo P. Smith, *being present as a member and representative of the firm of Smith, Ellett & Co.*, gave formal notice of the Smith, Ellett & Co. deed of trust," etc.; and in Finding V (Record, p. 9) we find John T. Morris, the surviving executor of the Larrabee estate, defining the claim as one "arising out of the sale of property in Virginia by the Government in disregard of the claim of the firm of Smith, Ellett & Co. as mortgagees thereof."

But Larrabee, having been admitted to full membership in the firm, became, of course, one of the beneficial owners of

the claim. Now, whatever interchange of interests took place about 1874 was merely between the persons already jointly owning the claim, no stranger being known to the transaction, and that this interchange was a qualified and incomplete one is clearly enough shown in Finding IV (Record, p. 9), where it appears that no transfer of ownership was made, even by entry on the books. The original evidences of debt filed in this proceeding by Mr. Smith shows no endorsement of any transfer whatever.

This transaction was manifestly incomplete, but that it was fully consummated in respect to Francis M. Ellett by the subsequent payment to him of one-third of the full value of the claim by Mr. Rinaldo P. Smith, as settling partner of the firm, is fully testified to by Mr. Ellett himself, who formally stated in the record of the court below, at page 93, that he would be bound and concluded by a judgment in this proceeding, thereby putting on record an effectual disclaimer.

But there was no testimony as to whether this incomplete transaction was ever completed in respect to Smith, who died before the testimony was taken, and there is nothing in the findings to show whether it was so consummated. On the other hand, about the time the transaction was consummated in respect to Ellett, we find Edward Otis Hinkley, as executor of Larrabee, consummating Smith's title to the claim by conveying back to him, as settling partner, Larrabee's equitable interest. Whether the former transfer had been completed or not, it was entirely competent and the only proper course for Larrabee's executor to convey his equitable interest back to Smith, the settling partner of Smith, Ellett & Co., since it had always been the manifest purpose and intent of all the parties that the claim should be sued for and recovered in the name of Smith, Ellett & Co., the original and proper claimants.

This manifest purpose to retain the legal title of this claim in Smith, Ellett & Co., the original claimants, was considered

to be a legal necessity at that date, since the act of February 26, 1853, ch. 81 (10 Stats., p. 170; section 3477, Revised Statutes), was at that time held to render absolutely void any assignment of any claim against the United States, and to preclude any prosecution of such claim by any assignee.

But it may be said in conclusion, and as absolutely conclusive of this point, that any transfer that was made of any interest in this claim was only between the equitable owners thereof, and *that every person at any time interested in this claim is included in and finally concluded by the record in this case*. This is all the certainty in respect to parties required by the rules of pleading.

Counsel has been making some laborious researches into the laws of Virginia and Maryland, and as a result he gravely informs us that "under the laws of both Maryland and Virginia the assignee could bring suit in his own name for the collection of the debt assigned." It is difficult to see what bearing this has upon the case, but if he will prosecute his researches farther, he will find that in both of those States an assignee of a specialty is only authorized to sue in his own name, *when the assignment is in writing*, and not in a case like the one at bar.

The contention that the jurisdictional act does not sufficiently describe the cause of action submitted for adjudication refutes itself and needs no comment on our part. That the property wrongfully taken was the lien of Smith, Ellett & Co., and no one else, upon the land of George J. Stephens, of Greene county, Virginia, and that Rinaldo P. Smith, as senior and settling partner and by the full authority of all the owners of the property in question, was the representative of Smith, Ellett & Co. for the collection of that claim and the prosecution of a suit, at the time of the passage of the jurisdictional act, is conclusively shown by all the proceedings.

III.

Under its third proposition the Government presents its views upon the real questions decided by the court below, which are properly before this court, and undertakes to defend the opinion of the lower court. To this end more than 25 pages of argument are devoted in the effort to show that the Mansfield case sustains the conclusion of the court below, upon which its decision is based, viz., that it was entirely discretionary with the internal-revenue collector to sell the land upon which claimant's lien rested, either by the summary process of distraint or by bill in chancery, and that *either* process was equally valid in law for conveying the fee-simple title. Counsel claims to find authority for this conclusion in the *dictum*, or rather *concessum* for the sake of that argument, made in the opinion in the Mansfield case at page 339, in the following words:

"It may be conceded that if the distiller had been the owner of the fee, a sale in that mode (distraint) would have passed his interest subject to the rights of any prior incumbrancer and subject to the right of any subsequent incumbrancer to redeem the premises."

This proposition may also be easily conceded in the case at bar. It is very obvious that, if the deputy collector had only undertaken to sell the equity of redemption of Stephens in the land, no damage would have resulted to this claimant. The property would no doubt have been sold then and there at a sum sufficient to have paid off claimant's demand in full and left a considerable sum to apply on the Government's claim, as the evidence shows there were a number of bidders present and anxious to buy, but none would bid after it became apparent that it was a lawsuit that was to be sold.

The collector had levied on the whole land as "the property of George J. Stephens" and insisted upon his right to

sell it as such, when Rinaldo P. Smith, being present as the representative of his firm, gave formal notice of their prior lien. All Smith asked was that the property be sold subject to the lien, but he was ignored by the collector, and, no one bidding, he struck the property off to the Government "as the property of George J. Stephens," and afterwards conveyed it to the Government as such, as appears by the recitals in his deed, and, by way of further excluding claimant's lien, added an extraordinary clause of *special warranty*.

But counsel saw a slight difficulty in the way of appropriating to the Government's use the above concession in the Mansfield case, since Stephens at the time of sale did not own the fee, but only an equity of redemption. With the agility of true genius, however, they spring lightly over this obstacle with the statement that Stephens had the fee at the time the lien of the Government, which they say was a first lien, attached. Where is the proof that the Government had a first lien? The deputy collector evidently *thought so*, for he proceeded on that theory; but he absolutely failed to recite in his deed the facts which the courts have held to be absolutely necessary to establish a first lien or any lien. *The adjudication of the priority of liens upon real estate to be sold by a layman like the deputy collector was precisely the mischief intended to be remedied by the act of July 20, 1868*, requiring a bill in chancery to be filed in all cases where any lien or other interest other than that owned by the distiller attached to the property. The act makes no mention of *first* or *second* lien, or any priority whatever, but says *"all persons having liens* upon the real estate to be sold *or claiming any ownership or interest* therein shall be made parties." It was just such a misfeasance on the part of a collector of internal revenue as in the case at bar that constituted the mischief sought to be remedied by the act of 1868; and that act, which by a well-known rule of law becomes mandatory when the rights of any lienor are drawn

in question, has furnished to the Government an adequate and complete method of determining priorities and finally adjusting the same. The *precise question* passed upon and finally decided by the *Mansfield case* is, that if the Government *neglects to adopt the method thus provided, it loses its priority, however clear it may have been.*

In that case the Government had an *indisputable and undisputed first lien* on the distillery premises, which alone were sold, created by the operation of the distilled liquor lien contained in section 3251, Revised Statutes, the moment the taxed whiskey came into existence, and *confirmed by the written and duly recorded waiver of the Bank of Chicago and all the other successive owners of the fee-simple title.* This court in its opinion *referred specially* to such *undisputed priority of the Government*, but held that it *had been waived and lost by the failure to proceed by bill in equity.*

The Court of Claims in its opinion says:

"Under the statutes in force at the time of the distraint and sale of the Stephens premises by the defendants in January, 1871, there were open to them two methods of enforcing their lien. The officers in charge elected to pursue the course prescribed by section 30 of the act of July 13, 1866 (14 Stat. L., 108). He might lawfully have proceeded under section 106 of the act of July 20, 1868 (15 Stat. L., 167). In either event his conduct would have been approvable in law. No positive duty was imposed, as contended by claimant, to proceed under the act of July 20, 1868."

If we were to consider that the foregoing statement of the law is correct, and that the marshal had the right to elect as to which remedy he should pursue, yet the effect of one of these procedures would be entirely different from that of the other. If he proceeded to enforce the Government's lien by invoking the assistance of a court of equity and bringing in all lienholders, the Government lien, if prior to the others, would be so found and paid in full and the sale of the property to satisy such prior lien would carry with it the entire

title, leaving to other lienholders a distribution of the balance according to their respective priorities. But if he decided to enforce the Government lien by distraint and sale, in which case no lienholder could have an opportunity to present his claim, the sale made by the marshal would carry with it nothing but whatever title the distiller had in the premises. The distiller's title to the premises was an equity of redemption as against outstanding liens. This was his whole interest in the property. A purchaser could take no more than Stephens had. The purchaser did not take by his purchase a *lien* upon the property; he did not take over by such purchase the Government's *lien*, for the sale satisfied the Government's claim and terminated its lien. The lien of the Government expired with the sale. Thereafter no question of priority could ever arise on behalf of the Government; and the marshal, in deciding to proceed by distraint and sale rather than in a court of chancery, *waived all claim of priority over any liens that may have existed against the real estate at the time of the distraint*, and the purchaser took exactly what Stephens had, an equity of redemption subject to the lien of claimant's mortgage.

Only Distillery Taxes Involved.

The author of the Government's brief takes exception to our proposition, that only distilling taxes are involved in the case at bar. He suggests that it is "erroneous, both in fact and law, and wholly without weight or merit." Let us see. George J. Stephens is described in Finding III (Record, p. 7) as a "distiller and tanner," and he is not otherwise spoken of anywhere in the proceedings. Then, no other taxes other than as a distiller and tanner can by any possibility be involved. We show that the tax on the avocation, or of any products of a tanner had been abolished several years before these proceedings were commenced. But counsel thinks that because the tanner's tax was not wholly abolished until March, 1868, and the collector had been

negligently permitting the tax to run in arrears since July, 1867, some portion of such arrears *might have been* tannery taxes accruing during those few months. That seems to be a favorite system of reasoning with the counsellor—"It might have been." But since the records show that the collector proceeded against the distillery premises alone, consisting only of the distillery buildings and three acres of land, upon which the law gave him a specific lien for distilling taxes, the tannery being left intact, we submit that the inference appears to follow that though there *might have been* a little four-year-old tannery tax, the probabilities are to the contrary; or, if any, they were a mere bagatelle, and *de minimis non curat lex.*

Apparently not satisfied with this demonstration, counsel contends that there were not only what he is pleased to call the "gallon tax" on spirits which is a specific lien on the distillery premises, but he endeavors to make it appear, by reference to some old repealed statutes, that there were other kinds of distillery taxes which are not thus a lien. In this effort counsel is simply in error. While the distiller did at one time pay a special license tax, *which was an annual tax, payable always in advance*, that tax was superseded by the gallon tax when the latter was increased, in 1866, to $2.00 per gallon, and said tax by its very terms has been from that day payable only on distilled spirits upon which *no other tax* has been paid. What counsel designates as "capacity tax" and "deficiency tax" are mere modifications of the gallon tax. The capacity of every distillery is surveyed by a Government expert when established, and the materials used are weighed in and charged to the distiller daily. If he fails to turn out gallons enough to satisfy these requirements, he is assessed for a deficiency in gallons accordingly.

But, evidently not satisfied at these efforts at avoidance of the question, counsel put their reliance on an opinion of the Attorney General's office which they cite (p. 20). This was merely an *ex parte* opinion, submitted at the request of the Treasury officers and, as usual in such cases, is favor-

able to the contention of those officers. It is a mere bald statement, not sustained by any reasoning, and entirely leaves out of consideration the history of these two separate liens, as fully set forth in appellant's original brief, at page 20 *et seq.*, and that *ex parte* opinion is so far qualified in the concluding sentences as to leave little of it remaining. It concludes:

"*There is nothing to forbid that general policy* (lien) *to apply* in all cases *where there is nothing in the special policy* (*lien*) *to contradict.*"

Everything in the special policy contradicts such a course. The amendment and perfection of that policy made by Congress in the act of July 20, 1868, as set forth in our original brief (p. 11), is diametrically opposed to the general (or tacit lien) policy. The essential policy of those amendments was absolute submission to and conformity with the land-registry system of the States. By that policy the claimant at bar was required to waive the priority of his lien on the three acres constituting the distillery premises as a condition of immunity from the internal-revenue laws. The policy of the special lien absolutely precluded the application of the general lien in the case at bar, because, being completely adequate in itself, it left no possible emergency in which any necessity could arise for the use of the general lien. The burning of the taxed whiskey while held in bond did not even present such an emergency, since the warehousing bonds held by the collector secured the Government in double the amount of the taxes due; and even if the sureties to the warehousing bonds had proved to be insolvent after proper efforts made to recover from them, the act of May 27, 1872 (17 Stats., 162), *which by retroaction expressly covered the time of the burning of the Stephens distillery*, expressly remitted the *tax* on spirits so destroyed and provided for their refund, if already paid. It follows, therefore, that the terms of the opinion cited in behalf of the Government denies to the collector the right

to invoke the general or tacit lien of 1866 in the case at bar. Up to the time of the burning of the distillery and contents, the collector had proceeded under the special lien for distillery taxes; all his proceedings after that time were under the assumed authority of the general tacit lien and were void, as declared in the Mansfield case.

Arlington Case Not in Point.

Counsel suggests that a possible remedy for appellant might have been found under the ruling in the Arlington case in December, 1882 (106 U. S., 196), that a tenant of the Government may be sued without an enabling act. But since the decision in that case was qualified with a proviso that the Government could not be concluded in such a suit, it is difficult to discover the remedial quality of that decision in respect to the case at bar, even if it had been available. But the appellant was called upon to determine his legal rights by the interpretation placed upon the law by this court in 1871, when the wrong was committed. For nearly a century previous to that time and for many years thereafter this court had repeatedly promulgated contrary views upon the doctrine involved in the Arlington case, and particularly in the case of *Carr vs. The United States* (98 U. S., 433), cited also on page 37 of our original brief, decided in 1878, the contrary doctrine was held. An enumeration of those cases is found in the dissenting opinion of Mr. Justice Gray in the Arlington case. Ignorance of the law excuses no suitor, but the knowledge he is required to have and act on is a current knowledge of *existing interpretation* of the highest court. The prescience which might foreshadow any future possible change of interpretation is not exacted even from a claimant seeking legal rights at the hands of his Government.

It is also urged that the mortgage-holder had an adequate remedy existing in his right to redeem the premises from the sale made by the collector. This was no adequate remedy—

indeed, no remedy at all—for to avail himself of it he would be compelled to pay the Government claim—a claim to which he was not a party, a claim which he was under no obligation to assume, and the payment of which would have greatly lessened and perhaps destroyed his security. Besides, this remedy, by redemption, in so far as it concerns all parties excepting the delinquent taxpayer himself, was repealed by the act of 1878, substituting a suit in equity as the remedy for the adjustment and final settlement of all interests other than those of the distiller. He had been willing to chance his original loan, but undoubtedly would not have been willing to increase his loan by redemption of the Government claim, especially since the findings do not show the property to have exceeded the mortgage in value. In some cases not difficult to imagine, the Government lien would be as great or greater in amount than the value of the entire property, in which case his redemption would be the cancellation of his own mortgage claim.

Question of Interest.

Counsel for the Government rest their opposition to our claim of interest on the original principal of the mortgage as the proper measure of damage upon the case of Tillson *vs.* The United States (100 U. S., 43, 46), which they say is "directly and conclusively in point."

We recognize in that case a fair exemplification of the doctrine of this court on the subject of interest on claims against the Government, and will make it the basis of a further demonstration in behalf of the allowance of interest in the case at bar.

That was an action purely *ex contractu*. It arose out of the contract of Robert Tillson with the Government for making and furnishing certain accouterments. There had been some default in its contractual obligations on the part of the Government, and Congress referred the claim to the

Court of Claims "to ascertain, determine, and adjudge the amount equitably due said firm, if anything, for such loss and damage." Chief Justice Waite, in delivering the opinion of this court, referred especially to the fact that in referring that contract for adjudication Congress was well aware of the existing general statute that no interest should be allowed on a contract against the Government unless expressly stipulated. Under the circumstances he thought that the failure of Congress to stipulate for the allowance of interest must be regarded as evidence that it did not so intend. He concluded:

"No interest was stipulated for in this contract, and the prohibition against its allowance has not been removed in favor of the claimant."

The case at bar is essentially different from the Tillson case in that it is essentially an action for damages and not for contractual remuneration. Since the enactment of section 1091, the element of interest has been completely eliminated from Government contracts. If Congress sends a contract for adjudication, it must restore the element of interest, which it has already by general law eliminated, if it desires such element to be considered; and the failure to do so has been rightfully interpreted by this court to be satisfactory proof of a negative interest.

But in a case of damage sustained by a tortious injury no such consideration is involved. It would have been entirely foreign to the proper consideration of this case to specify interest. Interest on what? There is no amount specified in the jurisdictional act upon which interest could be based. If the amount of claimant's lien or the Stephens land had been set forth, there might be some possible ground for the contention that interest ought to have been specified to indicate the full measure of damage. But, without mentioning any sum as a basis of reckoning, the manifest, indisputable intent of Congress is to give the claimant full and adequate redress for the wrong sustained.

We have not claimed interest as interest, but have suggested it as a convenient method of ascertaining the measure of damage, and the one generally resorted to by juries in such cases. Congress has not in the jurisdictional act undertaken to fix any rule for the measure of damage. If interest is allowed, it will be allowed not as interest, but as damages, as stated by Mr. Attorney General Cushing in his able opinion quoted in our original brief (page 33).

Damages sustained by the claimant are measured exactly by his loss. His loss is exactly the amount he could recover from Stephens, mortgagor, upon a foreclosure of his mortgage. The Government, by its purchase, taking only Stephens' equity of redemption, the right of the claimant to foreclose the mortgage was a continuing right against the Government, rendered futile only by reason of the absence of any legislation by which claimant could proceed as against the Government. The statute of limitation being waived in the act, the right of claimant to collect damages from the Government, as the successor in interest of Stephens, has suffered nothing from delay, and the damages sustained are exactly what would now be due from Stephens on the mortgage, with interest.

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No. 65.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

FRANK BLACKLOCK, EXECUTOR, APPELLANT,

v.

THE UNITED STATES, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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15240—07

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No. 65.

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES.

STATEMENT.

Jurisdiction to hear and determine this case was conferred on the Court of Claims by act of Congress approved May 27, 1902 (32 Stat. L., p. 243), reading as follows:

> That jurisdiction is hereby conferred on the Court of Claims to hear and determine the claim of Rinaldo P. Smith, of Baltimore, Maryland, against the Government of the United States on account of the sale, purchase, or occupation by the Government through its internal-revenue officers, or others, of certain real estate of one George J. Stephens, in Greene County,

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> Virginia, upon which the late firm of Smith, Ellett and Company, now represented by Rinaldo P. Smith, had a prior lien, and the right of the Government to plead the statute of limitations in bar of said claim is hereby waived: *Provided*, That said claimant file his petition within sixty days from the passage of this act in said Court of Claims, either at law or in equity, as he may deem the rights of his case shall require, and the Government shall, upon notice served according to the rules and practice of said court, appear and defend against said suit, and the same shall proceed to final hearing and judgment, with the right of appeal to the Supreme Court of the United States by either party, as provided by law.

As shown by the findings of fact, the facts in the case are substantially as follows:

On October 26, 1869, one George J. Stephens, a distiller and tanner of Greene County, Va., being indebted to the firm of Smith, Ellett & Co., leather and commission merchants of Baltimore, Md., in the sum of $7,000, executed a demand note for $4,000, reading as follows:

> On demand I promise to pay Smith, Ellett and Company the sum of four thousand dollars, value received.
>
> Witness my hand and seal this 26th day of October, 1869.
>
> GEORGE J. STEPHENS. [SEAL.]

And in order to secure the payment of the said indebtedness of $7,000, and also a further sum of

$2,000 to become due in the course of future dealings, the said Stephens, on the same date, executed a trust deed conveying to one Wyatt S. Beazely, as trustee, certain real estate belonging to him and consisting of 400 acres of land, more or less.

In December, 1870, the said George J. Stephens was indebted to the United States Government in the sum of $4,000 for delinquent internal-revenue taxes which had accrued between July, 1867, and August, 1869, and for which payment had been demanded prior to October 26, 1869, the date of the execution of the Stephens trust deed in favor of Smith, Ellett & Co., and in order to enforce collection of said delinquent revenue taxes the collector of internal revenue for that district of Virginia, by his deputy, A. M. Lawson, acting under the authority of and in accordance with the provisions of section 30 of the internal-revenue act of June 30, 1864, as amended by section 9 of the internal-revenue act of July 13, 1866 (14 Stat. L., 108), distrained and sold the land belonging to said Stephens which was covered by the said Stephens trust deed.

At said sale, which took place on January 12, 1871, Rinaldo P. Smith, a member of said firm of Smith, Ellett & Co., appeared and in behalf of said firm gave formal notice, before sale, of the lien of said firm upon said lands under the Stephens trust deed and declared it to be a prior lien to that of the Government. The sale was proceeded with, and there being no other bidder the property was bought by the collector, for

the Government, for the sum of $4,239.50, this being the amount of said delinquent revenue taxes, together with penalty for nonpayment thereof and costs of distraint and sale; and on January 12, 1872, at the expiration of the statutory term of one year, within which, as provided by the statute under which the sale was made, the property could have been redeemed by any person having any interest therein or lien thereon, and during which no one had taken any action to redeem the land, the sale of the land to the Government was made final by deed of that date executed by the said deputy collector, A. M. Lawson. About sixteen years later the Government disposed of its interest in the property by regular advertisement and sale at public auction.

The said firm of Smith, Ellett & Co., which consisted of Rinaldo P. Smith, the appellant's decedent, and Francis M. Ellett, was succeeded on January 1, 1870, by a new firm composed of the said Rinaldo P. Smith and Francis M. Ellett and an additional partner, William F. Larrabee, which new firm took over the entire assets of the old firm, including the said Stephens debt, which then amounted to somewhere in the neighborhood of $8,000, and continued in the same line of business, under the firm name and style of Larrabee, Smith & Ellett, until January 1, 1875, when the firm dissolved by limitation. The said Rinaldo P. Smith was the settling partner of both the said firm of Smith, Ellett & Co. and the succeeding firm of Larrabee, Smith & Ellett.

Some time during the existence of the new firm of Larrabee, Smith & Ellett, about 1873 or 1874, the said Stephens debt was sold and transferred for a full and valuable consideration to the said William F. Larrabee in his individual capacity, and was not thereafter carried on the books of said firm as an asset of the firm, nor on the books of the subsequent firm of Smith, Ellett & Co., organized after the dissolution of the firm of Larrabee, Smith & Ellett in 1875.

No action appears ever to have been taken by anyone for the purpose of realizing upon the said trust deed lien on the Stephens land except that in the year 1889 the trustee under the trust deed advertised the property for sale under the statutes of Virginia, which sale was precluded from being made by injunction proceedings in the Circuit Court of said Greene County, Va.

The claimant now seeks to recover damages against the Government on the ground that the Government's action in the sale of the land covered by said trust deed in favor of Smith, Ellett & Co. was wrongfully and illegally taken and prevented the holder of the Stephens debt from realizing upon the said deed of trust lien.

GOVERNMENT'S PROPOSITIONS IN DEFENSE.

Upon the facts in the case, as found by the court below, the Government submits in defense against the claim involved in this suit, and in support of the judgment of the Court of Claims dismissing the appellant's petition, the following propositions:

1. That no damage or loss has been shown to have been sustained by *anyone* by reason of the Government's action in the premises.

2. That it affirmatively and conclusively appears that the appellant has sustained no damage or loss by reason of the action of the Government in question.

3. That the action of the Government complained of was wholly within the Government's rights and in no way illegally or wrongfully invaded or prejudiced the rights of the holder of the said Stephens debt to Smith, Ellett & Co.

BRIEF OF ARGUMENT.

This suit is for the recovery of damages sounding in tort, resulting from alleged wrongful and illegal action of Government officers, and can be prosecuted only by authority of the special act of Congress conferring jurisdiction upon the court.

The provision of the jurisdictional statute waiving the right of the Government to plead the statute of limitations in bar of the claim, makes it seem rather doubtful as to whether Congress intended to recognize and give the court jurisdiction of a claim sounding in tort, such as is this claim. The court had never theretofore had any jurisdiction of such a claim, against which the statute of limitations could have run; and such being the case, this provision waiving the bar of the statute of limitations is meaningless in any other view of the case than that Congress did not intend to recognize and give the court jurisdiction of any claim sounding in tort, but in-

tended only to revive and restore to the claimant any right to prosecute a claim under the general statutes which may have been lost by the running of the statute of limitations.

But outside of this question of jurisdiction, the Government has several ample and complete defenses in this case.

I.

No damage or loss shown to have been sustained by anyone by reason of the Government's action in the premises.

No damage or loss whatever is shown by the findings of fact to have been sustained by *anyone* by reason of the Government's action complained of; and such being the case, there can be no recovery or judgment against the Government. It appears from the findings of fact (Finding IV, p. 9 record) that in 1873 or 1874 the Stephens debt was sold and transferred to, and became the property of the said William F. Larrabee, for a full face-value consideration; but beyond that it is not traced, and it does not appear that it was never paid by said Stephens.

This defense is conclusive against the appellant, and upon it alone the judgment of the Court of Claims dismissing the claimant's petition must be affirmed.

II.

The appellant has sustained no damage or loss by reason of the Government's action in the premises.

But aside from the fact that no actual damage or loss to *anyone* has been shown, and even if it were shown that the Stephens debt had never been paid,

there could be no recovery against the Government for the reason that, as appears from the record, neither the said firm of Smith, Ellett & Co., nor any member of said firm, has sustained any damage or loss by reason of the Government's action complained of.

As appears from the findings of fact (Findings II and IV, p. 7 record), the Stephens debt passed to and became the property of the new firm of Larrabee, Smith & Ellett upon its organization on January 1, 1870, and then, about 1873 or 1874, was acquired by and became the individual property of the said Larrabee by purchase from said new firm at full face value.

It is therefore clear that the said firm of Smith, Ellett & Co.—the only party in whose favor the prosecution of a claim against the Government can in anywise be considered to be authorized by the jurisdictional act—has never sustained any damage or loss by reason of the action of the Government in the premises.

There has been an attempt by amendment of the claimant's petition in the lower court to bring in as a claimant also the new firm of Larrabee, Smith & Ellett, of which firm also the said Rinaldo P. Smith appears to have been settling partner; but this can not be done. This claim has no status whatever, and is not being prosecuted as a matter of legal right under the general statutes, but under a special statute for the relief of a specially designated party; and such being the case, there is no jurisdiction of a claim of any other party conferred by the statute.

It is well settled that statutes of this general character are to be strictly construed. In Sutherland on Statutory Construction the law on this subject is laid down as follows:

> SEC. 391. Where special powers are conferred on a court either of otherwise general or limited jurisdiction, it is rigorously restricted to those granted, and the grant itself is strictly construed; the jurisdictional facts must appear on the face of the proceedings. The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. Nothing is to be presumed which is not expressly given.
>
> SEC. 392. The statutory remedy or proceeding is confined to the very case provided for and extends to no other. It can not be enlarged by construction, nor be made available or valid except on the statutory conditions; that is, by strictly following the directions of the act.
>
> SEC. 393. The party seeking the benefit of such a statute must bring himself strictly not only within the spirit, but its letter; he can take nothing by intendment.

The law, as stated above, is conclusively supported by a multitude of decisions cited by the author in support thereof.

It may be added that one of the strong reasons for a strict construction of such a statute as the one involved here is that Congress might well have good reason for giving relief to the party specifically des-

ignated in the act and might have special reasons for withholding relief from any other party who might be in any way connected with or interested in the matter in question.

It is certainly clear that the only claim within the jurisdiction of the court is either a claim in favor of the appellant's decedent, Rinaldo P. Smith individually, or a claim of the said Smith as the representative of said firm of Smith, Ellett & Co.; and as the findings of fact show that neither the said Smith individually nor said firm, or either of its members, sustained any damage or loss by reason of the action of the Government in the matter in question, there can be no recovery against the Government in this suit.

While admitted by counsel for appellant (pp. 5–6 and 38, Brief) that the Stephens debt was assigned by the said Rinaldo P. Smith and Francis M. Ellett to the said William F. Larrabee in 1873 or 1874, counsel contend (pp. 38–39, Brief) that appellant has a right to maintain this suit as a suit for a claim in favor of Larrabee's estate, for the reason that Larrabee was only an "equitable assignee;" but this contention is wholly without force, and for the following reasons:

First, it matters not whether or not the appellant's decedent, Rinaldo P. Smith, had a right under the State laws to prosecute a suit for the collection of the Stephens debt after it had passed to Larrabee, or, for that matter, at any other time. This is not a suit for *the collection of the Stephens debt*, but a suit

against the Government for the recovery of damage claimed to have resulted from alleged wrongful action on the part of the Government, and therefore dependent wholly and strictly upon the rights conferred by the jurisdictional statute; and such being the case, the question of what may have been Smith's rights in the matter of *the collection of the Stephens debt* is wholly immaterial here. The appellant's status and rights in this suit are solely and strictly derived from, and dependent upon, the jurisdictional act, the sole purpose and intent of which was to provide a remedy for the *firm of Smith, Ellett & Co., and none other*, in case said firm had suffered damage or loss by wrongful action of the Government; and as it clearly and conclusively appears that said firm suffered no damage or loss whatever, there can of course be no recovery against the Government.

And, second, even if it could be held that the appellant bears, in this suit *for damage, against the Government*, the same legal status, or relation, to the assignee of the Stephens debt as did his decedent, Smith, to said assignee in the matter of the prosecution of a suit *for the collection of said debt*, the contention of counsel would still be without force, as under the laws of both Maryland and Virginia the assignee could bring suit in his own name for the collection of the debt assigned. (Maryland: Acts of 1829, ch. 51; see also A. & E. Ency. of Pl. and Pr., vol. 7, p. 746; *Crawford*, v. *Brooke*, 4 Gill, 213; *Schafferman* v. *O'Brien*,

28 Md., 565. Virginia: *Garland* v. *Richeson*, 4 Rand., 268; *Feazle* v. *Dillard*, 5 Leigh, 30; *Dunn* v. *Price*, 11 Leigh, 209; *Stebbins* v. *Bruce*, 80 Va., 389; *Porter* v. *Young*, 85 Va., 49; *Norfolk Co.* v. *Read*, 87 Va., 185; *Tyler* v. *Ricamore*, 87 Va., 466.)

The right of action being thus with the assignee, this of course clearly precludes the bringing of suit by the assignor. The control of the assignor over the debt assigned ceased upon the assignment of the debt and passed to the assignee. (A. & E. Ency. of Law, vol. 2, p. 1088; A. & E. Ency. of Pl. & Pr., vol. 7, p. 739; *Mackie* v. *Davis*, 2 Wash. (Va.), 219, 230.)

But even if suit could have been brought by the assignor, Smith, Ellett & Co., for the debt after its assignment to Larrabee, it would necessarily have been a suit in the assignor's name, *for the use of the assignee*, and no such suit as this is authorized by the jurisdictional statute, which is the only warrant of authority for the prosecution of this suit.

As to the agreement of November 17, 1903, between the appellant, Blacklock, and Morris, surviving executor of Larrabee, set forth in Finding V (p. 9, record), contended by counsel for appellant to authorize the prosecution by the appellant of a claim in favor of the Larrabee estate, this agreement can give said estate no standing in court in this case. First, it is subsequent to the jurisdictional statute, and has for its object a radical modification of the jurisdiction conferred, which of course can not be effected by it, and even if this agreement were sufficient to give the

appellant the right *as between him and the Larrabee estate* to prosecute a claim against the Government, which we question. it can give him no standing in court under the jurisdictional statute. And, second, it is a champertous contract, as clearly appears upon its face, and is therefore illegal and void.

As to the alleged agreement between the appellant's decedent, Smith, and Edward Otis Hinkley, one of the Larrabee executors, authorizing Smith to prosecute a claim of Larrabee against the Government, and the proposition of counsel for appellant (pp. 38, 39, Brief), that this alleged agreement authorizes the prosecution herein of such a claim against the Government, we have to say, first, that no such agreement was found by the court below and set forth in the findings of fact; and, second, that even if there had been any such agreement, it would have been ineffective, illegal, and void, for the same reason set forth above as to the agreement of November 17, 1903, between Blacklock and Morris, and also for the further reason that it is not shown that any such agreement was ever authorized or approved by the probate or orphans' court, without which it would not have been valid.

Counsel for appellant (pp. 6, 38, and 39, Brief) set up and discuss this alleged agreement between Smith and Hinkley; but, as above noted, no such agreement is found and reported by the court in the findings of fact. The only reference contained in the findings of fact to such an agreement is a prefatory

recital in the agreement of November 17, 1903, between Blacklock and Morris, found and set forth in Finding V, that such an agreement was made between Smith and Hinkley; and this mere recital in the body of another agreement, found and reported by the court to have been made, by no means constitutes a finding of any such fact by the court. As a matter of fact, such recital would not even be competent to be considered as evidence in support of such a fact were the consideration of such evidence proper in this forum.

In regard to the proposition of counsel for appellant (p. 39, Brief) that the jurisdictional act does not leave open the question of Smith's right to maintain "the suit," but conclusively gives him such right, we fully concur in this proposition: Smith *was* given the right to maintain "the suit;" but it was a suit for the claim described in the jurisdictional act, a claim in favor of Smith, Ellett & Co., and not a claim of Larrabee's estate, which is being attempted to be substituted therefor.

In conclusion on this branch of the case, we will say that as the only claim before the court under the jurisdictional statute is a claim in favor of the firm of Smith, Ellett & Co., represented by Rinaldo P. Smith, the appellant's decedent, and as said firm is shown not to have sustained any damage or loss by reason of the action of the Government complained of, it conclusively follows that there can be no recovery against the Government.

III.

The action of the Government in no wise illegally or wrongfully invaded or prejudiced the rights of the holder of the Stephens debt.

But even if it could be held that the appellant can, under the jurisdictional statute, properly prosecute a claim against the Government in favor of the estate of Larrabee, there can be no recovery against the Government, and for the reason that the Government's action in the premises was wholly within its legal rights and did not in any way wrongfully invade or prejudice the rights of the holder of the Stephens debt.

This defense rests upon the following propositions, which the Government maintains are, upon the facts in the case, sound conclusions of law:

1. The Government's lien for the delinquent revenue taxes in question was prior to the Smith, Ellett & Co. trust deed lien for the Stephens debt.

2. The sale of the Stephens land by the Government by distraint was a legal sale and wholly and strictly within the rights of the Government.

GOVERNMENT HELD PRIOR LIEN.

The facts set forth in the findings of fact (Finding VI, p. 10, record) clearly and conclusively establish the priority of the Government's lien over the Smith, Ellett & Co. deed of trust lien of October 26, 1869.

The provision of law under which such facts created a lien on said property is contained in section 9 of the internal-revenue act of July 13, 1866, and reads as follows:

> And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation. (14 Stat. L., 107.)

The facts necessary to create the lien were, therefore, liability for the taxes, demand for their payment, and failure to pay after demand was made, all of which facts appear from said Finding VI; and the *priority* of the lien over the Smith, Ellett & Co. lien is shown by the fact found that demand for payment was made prior to the date of the Smith, Ellett & Co. deed of trust, October 26, 1869.

Counsel for appellant (pp. 27–32, Brief) question and attack this finding of the court below that demand for payment was made prior to October 26, 1869, alleging insufficiency of evidence to establish such fact; but it is well settled by the decisions of this court that the findings of fact of the Court of Claims are conclusive and can not be reviewed on appeal in this court (*United States* v. *Adams*, 6 Wallace, 101, 112; *Desmare* v. *United States*, 93 U. S., 605, 610; *Carver* v.

United States, 111 U. S., 609, 611), hence there can be no contention on this question of fact found by the lower court.

The proposition is advanced in behalf of the appellant (pp. 9–13 and 20–22, Brief) that *distillery taxes* alone are involved in this case, and that the Government's lien therefore extended only to the distillery products and premises and did not cover the principal portion of the land covered by the Smith, Ellett & Co. deed-of-trust lien. This proposition, which is for the first time advanced in this court, is erroneous, both in fact and in law, and wholly without weight or merit.

In the first place, the assumption and assertion that the delinquent revenue taxes in question consisted of distillery taxes alone is entirely outside of the findings of fact upon which the case is before the court; and, further, there is absolutely no ground for assuming any such fact, even if such a fact could properly be assumed and thus injected into the case. Counsel say (p. 9, Brief): "The internal revenue tax upon the occupation of a tanner was repealed by the act of March 31, 1868, chapter 41, and therefore distillery taxes alone are involved in the case at bar." Any such repeal, however, of the revenue tax upon the occupation of a tanner would not establish the assumed fact that *all* of the taxes in question were *distillery* taxes, since it appears from Finding VI that the taxes accrued between July, 1867, and August, 1869, the beginning of which period was nearly a year prior to the act of March 31, 1868, referred to.

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But even if all the delinquent taxes in question had been *distillery* taxes, this would argue nothing. In the first place, the specific lien, which counsel for appellant contend could attach only to the distillery products and premises, relates only to the *gallon tax* on the spirits distilled, which tax was only a *part* of the distillery taxes to be paid by the distiller. The language of the statute providing for this special *gallon tax* lien is as follows:

> That there shall be levied, collected, and paid on all distilled spirits upon which no tax has been paid according to law a tax of two dollars on each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof; and the tax shall be a lien on the spirits distilled, on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, and on the interest of said distiller in the lot or tract of land whereon said distillery is situated, from the time said spirits are distilled until the said tax shall be paid. (Act of July 13, 1866, sec. 32; 14 Stats. L., 157.)

This provision of law was substantially reenacted in the first section of the act of July 20, 1868 (15 Stats. L., 125), with the exception that the amount of the tax is reduced from $2 per gallon to 50 cents per gallon, and the lien specifically made a *first* lien.

Besides this *gallon tax*, there were four other kinds of distillery taxes to be paid by the distiller, namely, the distiller's *license* of $100 per year (14 Stat. L., 117, cl. 16); a *capacity tax* of $2 or more per day for

every day in the year exclusive of Sundays (15 Stat. L., 130, sec. 13); a *deficiency tax* of 50 cents per gallon and $4 per barrel for deficiency in production based upon estimates of production for materials used, and upon the producing capacity of the distillery (15 Stat. L., 133, sec. 20) and a *special tax*—usually termed *barrel tax*—of $400 or more per year (15 Stat. L., 150, sec. 59).

There were therefore in effect during half the time throughout which the delinquent taxes in question accrued these four additional kinds of *distillery taxes*, which might easily have within themselves amounted to and constituted the $4,000 of delinquent taxes for which distraint and sale were made, none of which were comprehended within the provisions of the special lien in question on the distillery products and premises for the gallon tax, and all of which, under the provisions of the act of July 13, 1866 (14 Stat. L., 107) conclusively became a lien upon all of the distiller's "property and rights to property," which included the lands involved in this suit.

And even if such delinquent taxes had been wholly composed of the *gallon tax*, which constituted a special first lien on the distillery products and premises, it was nevertheless also a lien upon all other property of the distiller, under the general lien provided by the act of July 13, 1866, referred to above, providing that *any* delinquent revenue tax, upon nonpayment after demand, should become a lien upon "all property and rights to property" belonging to the distiller. (16 Opinions of the Attorney-General, 634.)

In the above-cited opinion of the Attorney-General's office, rendered by Solicitor-General Phillips, it was held that a tax imposed upon a deficiency in the amount of spirits *actually exported*, as compared with the amount *withdrawn for exportation*, constituted a lien under the general provision for lien in section 3186, Revised Statutes, which corresponds to the general lien provided by the act of July 13, 1866, in question here. In this opinion occur the following pertinent and forceful remarks:

> So great was apprehended the difficulty of securing to the United States taxes laid upon spirits that not only is it constantly secured by a bond, but also by a sweeping lien upon all the property of the taxed debtor.
>
> It has been urged that the general provision for lien in section 3186 of the Revisal does not apply to spirits, because a more specific provision for a lien upon this subject is made elsewhere—section 3251, etc. It may be true that because of the *greater definiteness* of the special provision for a lien for the tax upon spirits there is rarely occasion for calling in the provision for a lien for taxes in general, but there is nothing to forbid that general policy to apply in all cases where there is nothing in the special policy to contradict.

The reasonable and logical view in the matter is that the *general* lien provided by the act of July 13, 1866, made *all* delinquent internal-revenue taxes, of whatsoever kind or character, a lien, after demand, upon all property or property rights of the delin-

quent distiller, and that the purpose of the *special* lien provided by said act, and reprovided by the act of July 20, 1868, was to further secure the payment of the *gallon tax* on the spirits produced by making it a *first* lien, dating from the *production* of the spirits, instead of leaving the creation and priority of the lien dependent upon demand for payment after its falling due, as was the case with all taxes as regards the general lien.

As to the decision of Judge McCrary in the *Pacific Railroad case* (1 Fed. Rep., 97), holding that the Government's lien attached only to such property as belonged to the distiller *at the time of the Government's demand for payment*, which decision is quoted from at page 27 of appellant's brief, this decision has no application whatever here, as in the case at bar the distiller was the owner of the property in question *in fee* at the time of such demand.

And here we will also briefly notice the suggestion of counsel for appellant that "the claimant, with a full knowledge of the law, had a right to assume when he took his mortgage, on October 26, 1869, that the Government had been collecting its taxes monthly, in compliance with its own mandatory laws, and therefore that the payment of the tax could not be more than one month in arrears," and that "by all the analogies of law the Government would be estopped in any proceeding for the enforcement of its lien from disputing that presumption."

In the first place, all distillery taxes were not due monthly, as assumed and alleged by counsel, some

being due yearly and others apparently quarterly (14 Stat. L., 106, 114, 150); and in the second place, as held in the two cases of *United States* v. *Pacific Railroad*, that have been cited by counsel for appellant (4 Dillon, 77, and 1 Fed. Rep., 99), there was no limit as to the time within which the Government could proceed for the creation and enforcement of its lien. Also, in the case of *United States* v. *Turner Bros. and Stoltz*, in the United States Circuit Court for the Southern District of Ohio, Mr. Justice Swayne held that the Government's lien was absolute and unconditional, and valid even against innocent purchasers. (18 Internal-Revenue Record, 5.)

The contention of counsel for appellant (p. 26, Brief) that the statement, or recital, in the jurisdictional statute to the effect that Smith, Ellett & Co. "had a prior lien" on the land in question conclusively established the priority of such lien is without foundation in law.

This recital in the act is purely and merely descriptive of the claim of which it was intended to give the court jurisdiction, and can under no rule of statutory construction be held to settle the question of whether or not such lien was prior to the Government's lien. (Endlich on Statutes, sec. 375; Sutherland on Statutory Construction, sec. 194; *Branson* v. *Wirth*, 17 Wall., 32, 44; *Kinkead* v. *United States*, 150 U. S., 483, 497; *Bishop* v. *United States*, 38 C. Cls. R., 473.)

This question is a mixed question of law and fact, and such a determination of it would be an assumption by the legislature of the functions of the court. In the *Kinkead case, supra,* this court said:

> It is well settled, however, that a mere recital in an act, whether of fact or of law, is not conclusive unless it be clear that the legislature intended that the recital should be accepted as a fact in the case.

There certainly is nothing in the act involved here clearly indicating any such legislative intent, and this very material question of priority of lien must therefore be determined by the court.

The discussion by this court in the case of *Tillson* v. *United States* (100 U. S., 43, 46) of the scope of the jurisdiction conferred by a special jurisdictional act very similar to the special act involved in this case, though directed to a different question, is clearly and forcibly in point on the question at issue here. In the opinion of the court, which was delivered by Chief Justice Waite, it was in substance stated that there being nowhere any intimation that the investigation and determination of the case was intended to be conducted otherwise than judicially, the determination of the case must be according to the fixed rules which govern the court in the adjudication of causes generally; that the same principles of jurisprudence and the same statutory regulations as to practice were to be applied that would be if the case had come into the court under its general jurisdiction, and that the case was to be ascertained and determined according to

the rules of law applicable generally to the settlement of controversies in the court.

But more directly in point and, it seems to us, absolutely conclusive against appellant's contention on this question is the language of this court in the case of *Branson* v. *Wirth*, *supra*, that—

> Whilst the recitals of public acts are regarded as evidence of the facts recited, it is otherwise, as we have seen, with respect to private acts. They are not evidence except against the parties who procured them.

In view of the fact that reference has been made in appellant's brief (p. 24) to the Smith, Ellett & Co. waiver of January 25, 1870, in favor of the Government, as regards the distillery property and premises, which waiver, upon the claimant's request, was included in the findings of fact (Finding X, p. 14, record), we will say here that so far as we can see this waiver has no bearing whatever in the case, since it relates only to taxes and penalties *thereafter accruing*, while the taxes and penalties involved here are taxes that had accrued, become due, and been demanded over a year prior to the execution of the waiver.

We submit that it must be held that the Government's lien attached not only to the distillery products, premises, and property, but also to all the other property belonging to the distiller at the time the lien attached, which included the land involved herein, and that it constituted a *prior* lien to that of the Smith, Ellett & Co. deed of trust lien.

GOVERNMENT'S RIGHT TO SELL BY DISTRAINT.

It is contended in behalf of the appellant that even if the Government's lien was a valid prior lien on all the land in question, the Government had no legal right or authority to sell the property by distraint; that it could be legally sold only by proceedings in chancery under the provisions of section 106 of the act of July 20, 1868 (15 Stat. L., 167), and that the Government's action in selling by distraint was subversive of the rights, and destroyed the security, of the holder of the Smith, Ellett & Co. lien.

The provisions of the statutes authorizing the sale of real estate for such taxes by distraint occur in sections 28 and 30 of the act of June 30, 1864, as amended by the act of July 13, 1866 (14 Stat. L., 107, 108), and read as follows:

> And if any person, bank, association, company, or corporation, liable to pay any tax, shall neglect or refuse to pay the same after demand, the amount shall be a lien in favor of the United States from the time it was due until paid, with the interest, penalties, and costs that may accrue in addition thereto, upon all property and rights to property belonging to such person, bank, association, company, or corporation; and the collector, after demand, may levy, or by warrant may authorize a deputy collector to levy, upon all property and rights to property belonging to such person, bank, association, company, or corporation, on which the said lien exists, for the payment of the sum due as aforesaid, with interest

and penalty for nonpayment, and also for such further sum as shall be sufficient for the fees, costs, and expenses of such levy. (Sec. 28.)

That in any case where goods, chattels, or effects sufficient to satisfy the taxes imposed by law upon any person liable to pay the same shall not be found by the collector or deputy collector whose duty it may be to collect the same, he is hereby authorized to collect the same by seizure and sale of real estate. (Sec. 30.)

The provision of the statutes under which appellant contends the land should have been sold by proceedings in chancery, instead of by distraint, is section 106 of the act of July 20, 1868 (15 Stat. L., 167), which reads as follows:

SEC. 106. *And be it further enacted*, That in any case where there has been a refusal or neglect to pay any tax imposed by the internal-revenue laws, and where it is lawful and has become necessary to seize and sell real estate to satisfy the tax, the Commissioner of Internal Revenue may, if he deems it expedient, direct that a bill in chancery be filed, in a district or circuit court of the United States, to enforce the lien of the United States for tax upon any real estate, or to subject any real estate owned by the delinquent, or in which he has any right, title, or interest, to the payment of such tax. And all persons having liens upon the real estate sought to be subjected to the payment of any tax as aforesaid, or claiming any ownership or interest therein, shall be made parties to such proceedings, and shall

> be brought into court as provided in other suits in chancery in said courts. And the said courts shall have, and are hereby given, jurisdiction in all such cases, and shall at the term next after such time as the parties shall be duly notified of the proceedings, unless otherwise ordered by the court, proceed to adjudicate all matters involved therein, and to pass upon and finally determine the merits of all claims to and liens upon the real estate in question, and shall, in all cases where a claim or interest of the United States therein shall be established, decree a sale, by the proper officer of the court, of such real estate, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

The position and argument of counsel for appellant appear to be that this provision of the statutes for sale by proceedings in chancery wholly and absolutely superseded the provisions of the statutes for sale by distraint *in all cases where there were other liens on the property besides the Government's lien*, and regardless of the question of priority; and that in such cases the Government's lien could be legally enforced only by proceedings in chancery.

We think it clear, however, that this provision for sale by proceedings in chancery is purely cumulative, and optional with the Government officials, leaving it wholly within the discretion of the Government, *in all cases*, to sell either by distraint or by proceedings in chancery; and we further think that

this construction of the law is clearly and conclusively supported by the decision and opinion of this court in the case of *Mansfield* v. *Excelsior Co.* (135 U. S., 326), and also by the opinion of the United States Circuit Court for the Eastern District of Wisconsin in the case of *Alkan* v. *Bean* (8 Bissell, 83).

There is nothing in the language of the act that is either conflicting or inconsistent with the then existing provision of law for sale by distraint in all cases, or which in any way indicates an intent to modify or restrict the Government's right to sell by distraint in any and all cases. On the other hand, the language of the act clearly indicates to the contrary.

In the first place, it says that the collector may enforce the lien by proceedings in chancery *in any case*, which leaves no room for the distinction drawn by counsel between cases where there are, and cases where there are not, other liens besides that of the Government.

And further, this right of enforcement of the lien by proceedings in chancery is, according to the language of the act, conferred, and to be exercised, only in cases "where it is lawful and has become necessary to seize and sell real estate to satisfy the tax." There was at that time no provision for seizing and selling real estate for such taxes except the provisions for sale by distraint; hence the above-quoted provision that sale by proceedings in chancery might be resorted to in any case *where it is lawful* to seize and sell real estate, shows clearly and conclusively that the remedy by proceedings in chancery was intended

to be concurrent with, and not conclusive of, the remedy by distraint. It could not be otherwise, since both remedies were to obtain in the same character of cases; that is, *in any case where it was lawful to sell by distraint.*

And more conclusive still is the permissive, or optional, character of the statute, which does not say that the collector *shall* proceed by a bill in chancery, but says he "may, if he deems it expedient," so proceed. Not only do we have the permissive term "may," showing this method of enforcement should be within the discretion of the Government officers, but also the further and unequivocally optional term "if he deems it expedient." The Commissioner of Internal Revenue *may, if he deems it expedient*, direct that a bill in chancery be filed.

And while it is true—as is argued by counsel for appellant—that in the interpretation of statutes, *may* is often construed to mean *shall*, yet any such interpretation in this instance would be wholly at variance with, and is absolutely precluded by, the accompanying optional provision "if he deems it expedient."

And again, if it had been the legislative intent that this remedy by proceedings in chancery should be mandatory and exclusive of the remedy by distraint in all cases where there were other liens on the property, it could, and undoubtedly would, have been plainly made to so appear in the act. In that part of the statute descriptive of the cases and conditions where the remedy by bill in chancery might be re-

sorted to, there is no reference whatever to cases where there are other liens on the property than that of the Government. After stating in what cases this remedy may be resorted to, it is provided that all persons who may have liens upon the property, or who claim any ownership or interest therein, shall be made parties to the proceedings; but this in no way indicates a legislative intent that this method of enforcement of the Government's lien should be mandatory and exclusive where there are any such liens.

This subsequent provision authorizing enforcement by proceedings in chancery was clearly and beyond question enacted for the purpose of giving authority to the revenue officers to so proceed in any case where they might deem it advisable to do so on account of there being intricate legal questions or conflicting interests, involving and making uncertain the rights or interest of the Government or of other parties, and which might, without a prior judicial determination of them, result in so clouding the title to the property that the Government would not be able, upon sale, to realize upon its lien to the full extent of the distiller's debt secured thereby.

As hereinbefore stated, there is nothing whatever in the statute inconsistent or in conflict with the prior and then existing provision of the statutes for sale by distraint; and such being the case, under a familiar and well-established rule of construction, it must be held not to have modified or restricted the provisions of the prior statute. "The law will not allow the revocation or alteration of a statute by construction when the

words may have proper expression without it." (Sutherland on Statutory Construction, sec. 217.)

There is also to be considered in the construction, or interpretation, of this statute, the fact of the long continued and practically unquestioned interpretation and practice of the Treasury Department, extending over a period of nearly forty years, holding its application in the enforcement of such liens on the property of distillers to be optional and within the discretion of the Government and in no wise to preclude enforcement by distraint, of which fact this court is cognizant and will take judicial notice. This interpretation and practice of the Treasury Department appears from the Department's action in the case at bar, and its action in the sales involved in the cases of *Mansfield* v. *Excelsior Co.* and *Alkan* v. *Bean*, hereinbefore cited, as well as in numerous other cases not necessary to cite. It further appears from the Department's "Regulations for the Observance of Revenue Officers, District Attorneys, and Marshals," in the execution of the internal revenue laws. The regulations of 1880 (p. 31) contain instructions as to sale by distraint, but contain none as to sale by proceedings in chancery; those of 1896 (pp. 31–32) contain instructions as to sale by distraint, together with instructions for sale by proceedings in chancery, "*if the collector is of the opinion that it would be better in any case*" to do so (the italics are ours), and these provisions of the regulations of 1896 are reprovided in the regulations of 1900 (pp. 34–35) and of 1904 (pp. 35–36).

As to the weight to be accorded to such long-continued interpretation of a statute by the public officials charged with its interpretation and enforcement, Sutherland, in his work on Statutory Construction (sec. 309), says:

> The practical construction given to a doubtful statute by the public officers of the State, and acted upon by the people thereof, is to be considered; it is, perhaps, decisive in case of doubt. This is similar in effect to a course of judicial decisions. The legislature is presumed to be cognizant of such construction, and after long continuance, without any legislation evincing its dissent, courts will consider themselves warranted in adopting that construction. Contemporary construction, and official usage for a long period, by the persons charged with the administration of the law, are among the legitimate aids in the interpretation of statutes.

This doctrine of law has been approved, and is now thoroughly established, by the decisions of this court in numerous cases. (*Edwards* v. *Darby*, 12 Wheat., 206, 210; *United States* v. *Bank of North Carolina*, 6 Pet., 29, 39; *United States* v. *McDaniel*, 7 Pet., 1; *United States* v. *Philbrick*, 120 U. S., 52, 59; *United States* v. *Johnston*, 124 U. S., 236, 253; *United States* v. *Alabama G. S. R. R. Co.*, 142 U. S., 615, 621; *United States* v. *Finnell*, 185 U. S., 236, 244.)

And further, in support of the construction or interpretation contended for by the Government, we have, as hereinbefore stated, the opinion of the United

States Circuit Court for the Eastern District of Wisconsin in the case of *Alkan* v. *Bean* (8 Biss., 83), decided in 1877, followed by the opinion of this court in 1890 in the case of *Mansfield* v. *Excelsior Co.* (135 U. S., 326), clearly and unequivocally to the effect that sale by distraint could legally be made, and would pass the distiller's interest in the property, where there were other liens or conflicting interests involved.

In the case of *Alkan* v. *Bean*, the distiller, Rindskopf, had sold the distillery to Alkan, subsequent to which sale certain additional revenue taxes were assessed against the distiller on account of spirits distilled prior to said sale, for the collection of which taxes distraint proceedings had been instituted by the collector, Bean, for the sale of the distillery premises and property. The purchaser, Alkan, then instituted proceedings in equity to restrain such sale by the Government, claiming that inasmuch as he had purchased the property from the distiller prior to the assessment of the taxes for the collection of which the Government had distrained, the property was not subject to the Government's lien. In the course of his opinion holding that such sale by distraint could not be restrained by the court, Judge Dyer (p. 89) in substance stated that the Government was authorized to collect such taxes "by the means proposed—the seizure and sale of the complainant's property."

As to the case of *Mansfield* v. *Excelsior Co.*, this case has, curiously enough, been cited and urged by coun-

sel for appellant (pp. 14–19, Brief) as supporting their contention that the Government's sale by distraint in the case at bar was illegal; whereas it, on the contrary, clearly supports the legality of such sale. The argument of counsel in the matter is, in certain respects, based upon false premises and erroneously drawn analogies between that case and the case at bar.

For instance, counsel say (p. 14, Brief) that the Mansfield case "was parallel in every essential particular to the case at bar," whereas in that case the pivotal point involved was the fact that the distiller was not the owner of the fee in the property in question when the Government's lien attached or at any other time; while in this case the distiller *was* the owner of the fee at the time the lien attached.

And continuing, counsel say (p. 15, Brief) that in the Mansfield case "the interest of the delinquent taxpayer in the land sold was a term of years; in the case at bar, it was an equity of redemption." The latter branch of this statement of counsel is erroneous and misleading; for while it is true that in the case at bar the distiller's (Stephen's) interest *at the time of the sale* was only an equity of redemption in the property, this is wholly immaterial and beside the case. The question here is not what interest Stephens had at the time of the *sale* of the land, but what interest he had *at the time the Government's lien attached. This* was the interest covered by the lien, and which the Government could sell by distraint; and as he then held an unincumbered fee in the land, it was to this

fee that the Government's lien attached, and not to an equity of redemption, as counsels' statement would seem to be intended to indicate.

Now, as to what was decided in the Mansfield case. In that case the distiller's interest in the distillery property and premises was only a leasehold interest, the fee in the property belonging to a third party, who had executed the waiver required by law in favor of the Government's lien for taxes. The Government distrained and sold the property for the delinquent taxes, and the question involved in the case was whether such sale passed the fee in the property to the purchaser, which question was decided by this court in the negative. The decision, however, was not based upon the ground that the sale by distraint was illegal, as counsel for appellant would have the court understand, but on the ground that the statute authorizing sale by distraint provided for the sale by such method of only the *distiller's* interest in the property—that is, his interest at the time, and to which the Government's lien attached; and that as the distiller was not the owner of the fee, the fee of course could not pass by such sale. Instead of holding that sale by distraint was illegal—as is contended in behalf of the appellant—the court in substance stated that such sale of the *distiller's* interest in the property was legal and passed such interest to the purchaser.

In answer to its own question (p. 339) as to in what mode the Government might enforce its prior lien, the court, after stating that it *might have* insti-

tuted a suit in equity to which the distiller and all other parties having liens or claiming any interest in the premises—which would have included the owner of the fee, and would have subjected the fee to sale for the satisfaction of the Government's lien—said:

> But no such course was pursued. The officers of the Government preferred to adopt the summary method of sale by the collector upon notice and publication, as provided for in section 3197. It may be conceded that if the distiller had been the owner of the fee, a sale in that mode would have passed *his* interest subject to the rights of any prior encumbrancer, and subject to the right of any subsequent encumbrancer to redeem the premises. But the delinquent distiller had no interest except a leasehold interest, and that expired, as we have seen, on the 1st of May, 1877. We are of opinion that the collector's sale in the summary mode prescribed in section 3197 passed, and under statute could have passed, nothing more than the interest of the delinquent distiller.

It should perhaps be noted here that section 3197, referred to by the court, corresponds to the provision of the act of July 13, 1866, for sale by distraint, in question in this case.

And again (p. 341), the court further says:

> When the distiller was in default in respect to taxes, it was for the proper officers of the Government to elect whether they would seek satisfaction of its demands by means of a seizure and sale by the collector of the distil-

> ler's interest only, or by a suit to which all persons having claims upon the premises on which the Government had a lien should be made parties. They chose to adopt the former method, under which only the interest of the delinquent distiller could be seized and sold. That interest being only a leasehold interest, the purchaser at the collector's sale acquired nothing more.

The statement of the court (p. 341) that "the Government neglected to pursue the only mode by which the fee could be sold; namely, a suit in equity, in which all persons interested in the property could have been made parties," is cited by counsel in support of their contention that in cases where, as in the case at bar, there were other liens or conflicting interests in the property, the fee could be sold only by proceedings in chancery. A most cursory reading of the opinion, however, shows clearly that this statement of the court was based wholly upon the special circumstance in that case of *the fee not having belonged to the distiller*, and that the statement, or conclusion, did not have any reference, or application, to cases where, as in the case at bar, the distiller was the owner of the fee when, and to which, the Government's lien attached.

It seems to us that the opinion of the court clearly and unquestionably supports the Government's contention that the collector's sale by distraint in the case at bar was legal and wholly within the Government's rights, and therefore in no way wrongfully invaded or prejudiced the appellant's rights or interests.

Counsel assert, in substance (p. 16, Brief), that the decision of the Court of Claims is at variance with the decision of this court in the Mansfield case; but, on the contrary, it is in full accord with the decision of this court in that case—it is merely at variance with the *erroneous construction given by counsel* to the court's decision and opinion in the Mansfield case.

In this connection we wish to repudiate the statement of counsel for appellant (p. 18, Brief) that in the argument of the case in the Court of Claims counsel for the Government had suggested that if the optional clause, "if he deems it expedient," had been retained in the Revised Statutes (sec. 3207) the decision of this court in the Mansfield case, which turned upon that section, might have been different. No such suggestion as this was made by counsel for the Government, and for the reason that the decision and opinion of this court in the *Mansfield case* was then, as now, construed by us, so far as applicable to the case at bar, as fully supporting the Government's position and contentions. What we *did* say was in effect that *notwithstanding* the fact that this optional clause had been omitted in section 3207 of the Revision, this court had held in the Mansfield case that said section left it optional with the Government as to whether sale should be by distraint or by proceedings in chancery; and this, the court will readily see, is to precisely the reverse effect of what counsel charges us with having said.

VALIDITY OF THE LAWSON DEED.

The question of the validity of Deputy Collector Lawson's deed conveying to the Government the Stephens land purchased by him, for the Government, at said distraint sale, has been raised by counsel for appellant (p. 26, Brief), it being contended that certain recitals of fact were omitted from the deed which were necessary to give it validity. As to this contention, we will merely say, first, that the deed contains all the recitals of fact necessary to comply with the statute and give it validity; and, second, that even if it had not been a valid conveyance, such fact would avail the appellant nothing in this suit, since if anyone had been damaged by such fact it would have been the *Government*, and not the *appellant*. The question upon which hinges the appellant's right to recover, is whether or not the sale of the land by distraint was within the Government's legal rights; and if, as we contend, it was, then the appellant could in no way have been wrongfully damaged by the action of the Government. As a matter of fact, if the appellant's lien or security had been affected in *any* way by said deed being invalid, it would have been favorably to the appellant; for if said deed had been a nullity, the Government would have taken nothing by it, and the situation would have been left more favorable to the appellant's realizing upon the Smith, Ellett & Co. lien.

QUESTION OF INTEREST.

It is contended in behalf of appellant that interest on the claim should also be allowed, in case judgment should be against the Government in the case; but under the law there could be no allowance of interest.

Section 1091, Revised Statutes, provides that "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest;" and it is so conclusively settled by the decisions of this court that interest can not be allowed in any case outside of the excepted class, whether pending under the general statutes or under a special jurisdictional statute, that argument on this question would seem superfluous. (*Rice* v. *United States*, 122 U. S., 611, 619; *Tillson* v. *United States*, 100 U. S., 43, 46; *Harvey* v. *United States*, 113 U. S., 243, 248.)

The *Tillson case*, *supra*, is directly and conclusively in point in this case against the allowance of interest. That case was also before this court on appeal from the Court of Claims under a jurisdiction conferred by a special act of Congress, the terms of which act were much more favorable to an allowance of interest than are the terms of the special jurisdictional statute in the case at bar; and in delivering the opinion of the court, holding section 1091, Revised Statutes, conclusive against an allowance of interest, Chief Justice Waite, after remarking that the failure of Congress to specifically grant

authority for the allowance of interest led irresistibly to the conclusion that it did not intend to give any such authority, said:

> By the statute, the court was required to investigate the claim and "ascertain, determine, and adjudge the amount equitably due such firm, if any, for such loss or damage." There is nowhere any intimation that the investigation is to be conducted otherwise than judicially. The reference was made to the court as a court, and not to the judges as arbitrators. The determination is to be made according to the fixed rules which govern that court in the adjudication of causes, and not at the discretion of the judges. The same principles of jurisprudence and the same statutory regulations as to practice are to be applied here that would be if the case had come into the court under its general jurisdiction. It is to be ascertained and determined what, if anything, is due the claimants from the Government, according to the rules of law applicable to the settlement in that court of controversies between the Government and its citizens.

There is nothing in the case at bar to take it from under the provisions of section 1091, Revised Statutes, prohibiting interest; hence no allowance of interest could be made even if judgment, upon the whole case, should be in favor of the appellant.

APPELLANT HAD REMEDY.

It is argued in behalf of the appellant (pp. 35–37, Brief) that after the Government's sale of the land by distraint, the appellant was without remedy for the

enforcement of his lien, even though it were a prior lien, and though said sale was illegal; but such was not the case, as appellant could, under such conditions, have enforced his lien after distraint and sale by the Government.

Even if the appellant's lien had been prior to that of the Government, the Government still had a right to distrain and sell the distiller's (Stephens') interest in the land, which would then have been an equity of redemption, and this would have been the interest which passed to the Government by its distraint sale and the Lawson deed. (*Mansfield* v. *Excelsior Co.*, *supra*.) Such being the case, both the fee in the land and the appellant's lien thereon would have remained undisturbed by such sale, leaving the land subject to the enforcement of said lien, which enforcement would have extinguished the Government's equity of redemption.

As to the occupation and holding possession of the land by the Government, alleged by appellant to have been wrongful and adverse to his rights and interest in the land, this was clearly within the Government's rights as the holder of the Stephens equity of redemption, as the holder of such an equity of redemption is entitled to the occupation and use of the land until such equity is extinguished, and the Government's equity was never extinguished, nor attempted to be extinguished, by enforcement of appellant's lien.

Now, with the Government occupying the land as the holder of the Stephens equity of redemption,

would there have been any remedy or course open to appellant for the enforcement of his deed of trust lien? There clearly would, and it would not have taken a suit in court against the United States for its enforcement, as is suggested by counsel for appellant.

The laws governing the enforcement of the lien were, of course, the laws of Virginia, and under these laws the trustee, at any time after condition broken, was authorized to sell the trust property by proceedings *in pais*—that is, by summary proceedings of notice and sale—*upon the demand of the trust creditor.* (Code of Virginia, 1860, secs. 5 and 6, p. 562; *Muller's admr.* v. *Stone*, 84 Va., 834.)

Section 6 of the Virginia code, cited above, following the specification in section 5 of a form of trust deed provides:

> The trustee in any such deed, except so far as may be therein otherwise provided, shall, whenever required by any creditor secured or surety indemnified by the deed or the personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall become payable and default shall have been made in the payment thereof, or of any part thereof, by the grantor, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, for cash, having first given reasonable notice of the time and place of sale; and shall apply the proceeds of sale, first to the payment of expenses attending the execution of the trust, including

> a commission to the trustee of five per cent on the first $300 and two per cent on the residue of the proceeds, and then pro rata (or in the order of priority, if any, prescribed by the deed), to the payment of the debts secured, and the indemnity of the sureties indemnified by the deed, and shall pay the surplus, if any, to the grantor, his heirs, personal representative, or assigns.

And further on this point, the Virginia courts hold that the trustee represents *all parties in interest*, and that only *he* need be made a defendant in a suit involving the trust. (*Muller's Admr.* v. *Stone*, 84 Va., 834; *Buck* v. *Pennybacker*, 4 Leigh., Va., 5.) The decision and opinion in *Muller* v. *Stone*, cited above, so conclusively sustains our contention in this matter that further argument is needless.

It is thus clear that if the appellant's lien *had* been, as is claimed, a prior lien, it could have been enforced by the appellant by his requiring the trustee to sell summarily, merely upon proper notice of sale, under the provisions of the statute above quoted, at any time after condition broken, and that upon such sale the Government's equity of redemption acquired from Stephens would have been wholly extinguished.

And if it should be suggested that even after such sale and the extinguishment of the Government's equity of redemption there would have been no way to secure possession of the land from the Government, in case it had refused to vacate, we answer, first, that such wrongful and illegal action on the part of

the Government is not to be presumed; and, second, that even if the Government had refused to give possession of the land, possession could have been secured by the purchaser of the fee at such deed of trust sale by his bringing action in ejectment, not against the Government, but against the actual occupant of the land, the Government's tenant or other representative. That this could have been done has been definitely and conclusively settled by the decision of this court in the noted "Arlington case." (*United States* v. *Lee*, 106 U. S., 196.)

It is therefore clear that even if the claimant's lien *had* been prior to the lien of the Government, the action of the Government was strictly within its legal rights; and that if the appellant suffered any damage or loss in the premises it was due solely to his own negligence or fault in not enforcing his lien during the period of its validity, apparently through his having misjudged the law and his legal status and rights in the matter and is not properly chargeable to the action of the Government in the premises.

As to the complaint of appellant that the Government's holding possession of the land until the enforcement of his lien was barred by the statutes of Virginia, we need say no more than that, as above shown, he did not have to wait for the enforcement of his lien until the Government had sold the land, but could have proceeded with its enforcement at any time; and that his right of enforcement of the lien was therefore lost as a result of his own negligence in the matter.

And even if it could be held that the Government's sale by distraint was illegal, the appellant yet had his remedy; for if the sale had been illegal, no interest whatever in the land would have passed to the Government by the Lawson deed, and appellant's lien could have been enforced at any time after condition broken. And while the Government was in possession of the land, yet this possession would under such conditions have been wholly without right or legal authority, and possession could under the decision of the court in the Lee case, cited above, have at any time been secured either by Stephens or by the purchaser of the land at the trust-deed sale for the enforcement of appellant's lien, by action in ejectment against the Government's tenant or representative in actual possession of the land.

Attention is further called to the fact that under the statutes (14 Stat. L., 109) the appellant could have redeemed the property at any time within one year after the Government's sale of it by distraint by paying the Government the sum of $4,239.50, the amount of the delinquent taxes, penalty, and costs of sale, together with interest thereon, and thus have become subrogated to all of the rights of the Government in the property.

VALUE OF LAND.

Counsel for appellant (pp. 3 and 37, Brief) have discussed the question of the value of the land involved in the case, but since the findings of the Court of Claims do not fix the value of the land, but leave

this question for future determination by that court in case this court should hold appellant entitled to recover against the Government, any discussion of this question is out of place here.

CONCLUSION.

As stated by the court below, in the concluding paragraph of its opinion, the appellant "not having availed himself of his rights under the law in protecting his lien, which were ample and comprehensive in every respect, and which were in no wise unlawfully interfered with by the defendants," no liability can be imputed to the Government for the assertion of its claim in the manner in which it was asserted and enforced.

Upon the whole case we respectfully submit that the appellant is not entitled to recover against the Government, and that the decision of the Court of Claims should be affirmed.

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